

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - -

HODELL-NATCO INDUSTRIES,	:	CASE NUMBER
INC.,	:	1:08 CV 2755
Plaintiff	:	
	:	
vs.	:	
	:	
SAP AMERICA, INC., et	:	
al.,	:	
Defendants	:	

- - -

Friday, November 2, 2012

- - -

Videotaped videoconferenced
deposition of BROOKS LOUIS HILLIARD, CMC, CCP,
taken at the law offices of Drinker Biddle &
Reath LLP, One Logan Square, 18th and Cherry
Streets, Philadelphia, Pennsylvania 19103,
beginning at 9:09 a.m., before Cheryl L.
Goldfarb, a Registered Professional Reporter
and an approved reporter of the United States
District Court.

- - -

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21 ---

22 ALSO PRESENT:

23
24 W. RUSSELL STRAIN, CLVS
25 The Video Technician

1 INDEX

2 ---

3 WITNESS: BROOKS LOUIS HILLIARD
4 QUESTIONED BY: PAGE:
5 MR. LAMBERT 5
6 MR. HULME 165

7 ---

8 E X H I B I T S

9 NUMBER DESCRIPTION MARKED FOR ID
10 Exhibit 462 Expert Report 42
11 dated August 10, 2012
12

13 ---

14 DEPOSITION SUPPORT INDEX

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16 DIRECTION TO WITNESS NOT TO ANSWER
17 Page Line Page Line
18 140 11-12
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20 ---

1 THE VIDEO TECHNICIAN: We're now
2 on the record.

3 My name is Russ Strain, from
4 Veritext Court Reporting Company. The
5 date today is November 2nd, 2012. The
6 time is approximately 9:09 a.m.

7 This deposition is being held at
8 the office of Drinker Biddle, One Logan
9 Square, Philadelphia, Pennsylvania.

10 The caption of the case is
11 Hodell-Natco Industries, Inc. versus SAP
12 America, Incorporated, et al., filed in
13 the U.S. District Court for the Northern
14 District of Ohio, Eastern Division, Case
15 Number 1:08 CV 2755.

16 The name of the witness is
17 Brooks Hilliard.

18 If counsel at this time will
19 please introduce themselves for the
20 record.

21 MR. STAR: Greg Star, on behalf
22 of SAP America and SAP AG.

23 MR. LAMBERT: Wes Lambert on
24 behalf of Hodell-Natco Industries, Inc.

25 MS. MYERS: Laura Myers on

1 behalf of Hodell-Natco Industries, Inc.

2 MR. HULME: Roy Hulme on behalf
3 of LSI and IBiS.

4 THE VIDEO TECHNICIAN: The court
5 reporter is Cheryl Goldfarb of Veritext.

6 Would the court reporter please
7 swear in the witness.

8 THE COURT REPORTER: Will you
9 please raise your right hand.

10 ---

11 BROOKS LOUIS HILLIARD, CMC, CCP,
12 after having been first duly sworn, was
13 examined and testified as follows:

14 ---

15 THE WITNESS: I do.

16 THE VIDEO TECHNICIAN: The
17 testimony can now proceed.

18 ---

19 EXAMINATION

20 ---

21 BY MR. LAMBERT:

22 Q. Good morning, Mr. Hilliard. How
23 are you doing today?

24 A. Good. How are you?

25 Q. Good. My name is Wes Lambert,

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1 and I represent Hodell-Natco in this lawsuit
2 against SAP and its business partner LSi and
3 IBiS.

4 During the course of the
5 deposition -- as you may be aware, Hodell is
6 suing both SAP America, Inc. and SAP AG. I'm
7 going to refer to them just jointly as "SAP."
8 If for some reason you need to make a
9 distinction between the two, please let me
10 know. Okay?

11 A. Certainly.

12 Q. And I'll refer to LSi and IBiS
13 just as "LSi." And the same rules apply. If
14 you need me to make a distinction between the
15 two, just let me know. All right?

16 A. I will.

17 Q. Since we're doing it by
18 videoconference, there is a little bit of a lag
19 between my question and your answer. So let's
20 try to be careful about talking over each
21 other. Try to make sure that my question is
22 finished before you begin to answer, and I'll
23 make sure that your answer is finished before I
24 raise the next question.

25 Is that okay?

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1 There have been others that have
2 related to intellectual property issues related
3 to hardware and/or software or other computer
4 technology.

5 There have been a variety of --
6 there have been a few times I've been deposed
7 with regard to electronic discovery of data.

8 There have been a few times,
9 other -- other issues related to computer
10 technology, either hardware or software or
11 services.

12 Q. Okay. When was the last
13 instance you were deposed?

14 A. It was earlier this year, in a
15 case that was a dispute between an automobile
16 dealership and a hardware and software vendor
17 that had sold a system to that dealership.

18 Q. And who were you -- who were you
19 testifying on behalf of in that -- in that
20 matter?

21 A. My client was the law firm that
22 represented the dealership.

23 Q. So in that case, the customer of
24 the software vendor?

25 A. Yes.

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1 A. I'll do my best.

2 Q. Okay. And if you don't
3 understand any of my questions, just please let
4 me know, and I'll certainly do my best to
5 rephrase it.

6 A. All right.

7 Q. Have you ever had your
8 deposition taken before in a non-expert witness
9 capacity?

10 A. Not that I recall.

11 Q. How many times have you had your
12 deposition taken as an expert?

13 A. I don't recall the exact number,
14 but it's in excess of -- of 30.

15 Q. Excess of 30 times?

16 A. Yes.

17 Q. Have they all been -- have they
18 all related to software implementations?

19 A. No.

20 Q. Is there a way you can break
21 those 30 down into any general categories?

22 A. At least half of them have
23 related to software functionality and/or
24 software implementations, and in some cases
25 both.

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1 Q. And they -- what was the general
2 nature of the dispute?

3 A. It related to the software
4 vendor's -- well, they were actually a complete
5 system, hardware and software, that they had
6 supplied to the -- to the dealership.

7 It related to the issues in the
8 contract between the two. In particular, the
9 dealership -- or the dealership believed that
10 it was entitled to terminate the contract and
11 the supplier believed -- maintained that
12 it -- it was not.

13 Q. The vendor in that instance,
14 would that be a party that would be similar to
15 SAP or similar to LSi in this case?

16 A. In -- in some respects.
17 Although in that case, the vendor sold a -- the
18 hardware as well as the software, as well as
19 providing all the services. There were no
20 business partners involved with that vendor.

21 Q. So the vendor was actually the
22 party that developed the software at issue?

23 A. Yes.

24 Q. Okay. What was the outcome of
25 that case?

3 (Pages 6 to 9)

1 A. It settled shortly after my
2 deposition.

3 Q. Is that the -- is that the
4 Republic Ford class action matter that's
5 referenced in your report?

6 A. The -- the one that begins with
7 Republic Ford. There have actually been about
8 15 or 18 cases, one of which was a class
9 action. The others were all individual
10 litigation between the -- the supplier and
11 individual dealerships. And this was the most
12 recent of those.

13 Q. How many times have you actually
14 testified in trial or arbitration as an expert?

15 A. In excess of two dozen times.

16 Q. Have you ever been excluded from
17 testifying as an expert witness?

18 A. In one case, the law firm that
19 retained me, subsequent to retaining me and
20 subsequent to my preparing a report, wound up
21 stipulating to all of the issues that I was
22 retained to -- to analyze and speak about.

23 Prior to that stipulation, there
24 had been a -- a motion to exclude me. The
25 court did exclude me not because of any of my

1 qualifications, but, rather, because none of
2 the issues that I was going to testify about
3 were relevant anymore, since they had all been
4 agreed and/or stipulated by the parties.

5 That's the only time.

6 Q. Okay. You've never lost a
7 Daubert challenge or a Daubert hearing?

8 A. Well, that was a Daubert -- that
9 was a Daubert decision, but -- but it wasn't
10 based -- I wasn't excluded based on the normal
11 Daubert criteria. I was excluded because, as I
12 say, none of the issues that I was testifying
13 on were going to be raised during the course of
14 the trial.

15 Other than that, there has been
16 no time where I've been excluded on a Daubert
17 motion.

18 Q. Can you tell me who you have
19 spoken with at SAP relating to the issues
20 involved in this lawsuit or your report?

21 A. I spoke to several people, but
22 it was prior to completing the report. I've
23 been busy on other cases and doing other --
24 other work in the meantime. And I don't recall
25 the specific names of the people to whom I

1 spoke, but they are listed in my report. And
2 there's been none since then.

3 Q. Do you recall where in your
4 report it's listed, the people you spoke with
5 are listed?

6 A. There's a section in my report
7 that deals with the procedures near the
8 beginning of the report.

9 Q. Okay. I'll represent to you
10 that I don't see any names listed. If Mr. Star
11 wants to show it to you, he certainly can.

12 A. My -- I stand corrected. I
13 didn't -- I don't recall who I spoke to. And I
14 didn't -- I didn't list it here.

15 Q. Okay. Is it accurate to state
16 that you don't recall the names of any
17 individuals employed by SAP that you spoke with
18 in the context of this litigation?

19 A. Yes.

20 Q. Did you speak with any former
21 SAP employees in the context of this litigation
22 or your report?

23 A. Not that I recall.

24 Q. Did you speak with anyone
25 currently or formerly employed by LSi in the

1 process of analyzing and preparing your report?

2 A. No.

3 Q. Did you speak with any other
4 third parties in the context of preparing the
5 report in this case?

6 A. I spoke to a former salesman for
7 Profit 21, whom I've known for many years, and
8 I spoke to a former sales director for a
9 representative of the FACTS software, whom --
10 whom I've also known for -- for many years,
11 about those two products and how they're used.

12 But I didn't speak to them --

13 Q. And what was the --

14 A. I didn't speak to them about any
15 of the issues in this case.

16 Q. What was the P 21 salesman's
17 name?

18 A. Alan Wood.

19 Q. And what was the FACTS
20 salesperson's name?

21 A. Boy, it will come to me in a
22 second. You know, his name is on my website,
23 because I have -- we have contemplated doing
24 some work together. But I can check that at a
25 break and give it to you then. It escapes me

1 right at the moment.

2 Q. Okay. Other than the
3 educational background listed in your report,
4 do you have any other formal education or
5 training?

6 A. Well, I attend seminars related
7 to management consulting and expert analysis
8 and expert testimony put on by the Institute of
9 Management Consultants and the Forensic Expert
10 Witness Association from time to time. And I
11 have -- I have attended a number of those.

12 I attend seminars and/or
13 training sessions either through like webinars,
14 over the web, or sometimes in person, put on by
15 various suppliers of computer systems and
16 software. Nothing as formal as the
17 undergraduate engineering degree or the -- the
18 MBA program, obviously.

19 Q. Your undergrad degree was in
20 engineering from MIT, correct?

21 A. That's correct.

22 Q. Did you -- does that degree
23 relate at all to your opinions rendered in this
24 case?

25 A. Well, the engineering

1 background, of course, is -- is the foundation
2 of -- on which my expertise has been built.
3 And I -- I certainly learned a fair amount
4 during the course of -- of my years at MIT
5 about computer systems, computer software,
6 computer technology. But there are no
7 specifics that come to mind, certainly, that
8 relate to the issues in this case.

9 Q. What year did you graduate from
10 MIT, by the way?

11 A. 1968.

12 Q. What year did you graduate or
13 obtain the MBA from Harvard?

14 A. I was actually in the Harvard
15 class of 1970. But as you may recall, we had a
16 war going on at the time, so I departed for
17 three years to serve in the military. And I
18 came back and graduated in 1973. I'm listed
19 for alumni purposes as part of the class of
20 '70.

21 Q. Okay. Are those the only two
22 formal degrees that you hold?

23 A. Yes.

24 Q. What did the -- did you have any
25 specialty or concentration with respect to the

1 Harvard MBA?

2 A. Yes. My concentration was in
3 marketing.

4 Q. Any specific aspect of marketing
5 or just marketing in general?

6 A. I really focused on
7 business-to-business marketing rather than
8 consumer marketing, and such that when I
9 graduated, I started working in marketing for
10 computer companies, doing business-to-business
11 marketing.

12 Q. Do you have any computer science
13 degrees?

14 A. No. At the time I went to MIT,
15 there was no computer science degree offered by
16 MIT, at least at the undergraduate level. I
17 believe at the graduate level as well. I
18 predated their offering a computer science
19 degree.

20 Q. Okay. With respect to your --
21 either MIT or Harvard, what's the extent of the
22 coursework you took with respect to computer
23 sciences?

24 A. I took the introductory course
25 on computers my first semester of my freshman

1 year at MIT. I was able to persuade my
2 counselor to allow me to take the upper level
3 software programming course my second semester
4 as a freshman.

5 At that time, MIT offered only
6 two software courses to undergraduates. I took
7 both of them my freshman year. And then I
8 started working as a software developer for a
9 large software consulting firm summers and
10 part-time following my freshman year at MIT.

11 But there were no more
12 programming courses available for me to take,
13 so I didn't take any others. Many of my
14 courses used computers for various things. And
15 I was involved in that, but -- and there were,
16 of course, courses on hardware design and --
17 and the electronics of computers. But that
18 wasn't an interest of mine. And I didn't -- I
19 didn't take any of those courses.

20 So, basically, I exhausted MIT's
21 undergraduate software courses my freshman
22 year. This was early --

23 Q. And anything at --

24 A. -- in the industry.

25 Q. Anything at Harvard with respect

1 to computer sciences?

2 A. We used computer modeling in
3 some of the courses to model the way businesses
4 responded to various stimuli. And that was
5 pretty much the extent of it.

6 There may have been, also --
7 Harvard Business School is a case method
8 school, much like law schools operate on the
9 case method. And we may have had some courses
10 on computer -- marketing in the computer
11 industry or other computer industry-related
12 cases. But I don't remember specific cases.

13 Q. Do you have any experience
14 writing or reviewing software code?

15 A. Yes.

16 Q. And what -- can you elaborate on
17 your experience for me?

18 A. I'd be happy to.
19 Following my freshman year at --
20 at MIT, I -- beginning that summer and
21 continuing through my time at MIT, I worked as
22 a software developer for Informatics,
23 Incorporated, which at the time was one of the
24 largest software consulting firms in the world,
25 later absorbed into Sterling Software.

1 I worked on an Air Force project
2 my first summer with them. I later worked on
3 the Surveyor moon mission and the Mariner Mars
4 mission, developing software for those
5 missions.

6 And I also worked developing
7 commercial software that Informatics was
8 contracted with Honeywell Corporation to
9 develop. We developed software that Honeywell
10 was going to deliver -- I was involved in
11 developing software that Honeywell was going to
12 deliver to its customers throughout the world.

13 Upon graduating, I -- well, once
14 I went into the military, I joined the U.S.
15 Coast Guard and I was stationed at U.S. Coast
16 Guard headquarters in Washington, D.C., working
17 in the Naval Engineering branch of the
18 engineering division. I developed software for
19 vessel maintenance that was used by the Coast
20 Guard for at least ten years, was when I last
21 checked, after I developed it.

22 Upon going back to Harvard
23 Business School and graduating in '73, I
24 started working for computer companies,
25 including Linolex Systems, which was later

1 acquired by 3M, Sanders Associates, which was
2 acquired by Harris Corporation, and ITT
3 Courier.

4 I was involved as a marketing
5 manager and product line manager in all of
6 those companies, where I had direct
7 responsibility for specifying software
8 capabilities, working with our development
9 groups to develop software that met those
10 capabilities, ensuring that it did, monitoring
11 the progress of those software projects,
12 reviewing the test results, and then ultimately
13 marketing -- rolling out those products to the
14 market and -- and giving feedback and working
15 with development to improve the functionality
16 of those products to meet market demands as
17 they arose.

18 I wasn't actually doing the
19 development during -- in any of those
20 positions, but I had a direct interface with
21 the development managers and direct input and
22 review responsibility for the functionality and
23 quality of those products before I was willing
24 to roll them out to the customers in the field.

25 I should also say --

1 Q. On any of those projects you
2 just --

3 A. I should also say --

4 Q. I'm sorry.

5 A. -- after leaving Courier in
6 1980, I set up my own firm, which is the same
7 firm I have today, Business Automation
8 Associates, Inc., where from 1980 to 2000, the
9 majority of my work was working with businesses
10 that some of which could be considered very
11 comparable to Hodell-Natco, that needed to
12 understand -- to define their needs, find
13 software and hardware that would meet those
14 needs from various vendors, select the hardware
15 and/or software that -- that best met those
16 needs and got that software and followed
17 through to a successful implementation.

18 Part of that was looking for
19 software that was as close to plain vanilla as
20 possible, but in many cases there were add-ons
21 or modifications that had to be made to the
22 software that I would be responsible for
23 specifying and then working with the vendors or
24 monitoring the results of the vendors to comply
25 with the -- the specified add-ons or changes to

1 that software.

2 All of that software was
3 business software, products much like Business
4 One, in many cases products focused on a
5 particular market, such as distribution. And
6 it's in that capacity that I got to know the
7 folks from Prophet 21 and from FACTS.

8 Q. On any of those projects that
9 you just described where you actually developed
10 software, were you the lead developer or were
11 you a junior member of the team or what was
12 your actual position in the hierarchy there?

13 A. In -- starting from the
14 beginning, the -- the work with Informatics, I
15 was typically -- I was a member of a team, but
16 I was typically given a discrete capability
17 where I was the lead developer for that
18 discrete capability that had to be developed as
19 part of the -- of the contract or part of the
20 space mission.

21 In -- when I went to the Coast
22 Guard, I was the specifier and lead developer
23 of the vessel maintenance software that I did
24 at the Coast Guard.

25 I haven't done any software

1 development professionally since leaving the
2 Coast Guard. From that point on, I was
3 involved in management and the oversight of
4 development.

5 Q. Okay. So when was the actual
6 last development you did of software?

7 A. The last time I --

8 Q. The years.

9 A. -- personally wrote commercial
10 software professionally was 1972.

11 Q. You list two publications in
12 your report. One is, "Buying a Computer for
13 Your Growing Business," written in 1984.

14 What was the subject of that
15 publication?

16 A. That was a book published by Dow
17 Jones. The target audience for the book was
18 owners and managers of midsize businesses that
19 were looking to acquire business software for
20 their companies, helping them understand what
21 they needed to do to communicate their needs
22 accurately to the suppliers of the hardware and
23 software. And it was folks both on hardware
24 and software.

25 So what they needed to do to

1 communicate their needs accurately to the
2 suppliers of hardware and software. How to
3 find hardware and software vendors with systems
4 that could meet their needs. How to select the
5 option that best met their needs. What issues
6 they needed to look at in contracting with the
7 suppliers of those systems. And then what
8 things they needed to look at during the course
9 of implementation, to make sure that the
10 implementation was successful.

11 By and large, those were the
12 same issues that I did professionally as a
13 consultant.

14 Q. Is there anything in that
15 publication, the "Buying the Computer for Your
16 Growing Business" publication, that has any
17 bearing on your opinions in this matter?

18 A. No specifics. Although the --
19 the general approach that I advocate using, the
20 factfinding approach, is much the same as the
21 approach that I use in expert witness
22 engagements and that I used in this engagement.

23 Now, obviously the approach has
24 to be adapted to looking back forensically at
25 something that's already occurred rather than

1 looking forward to making a selection.

2 And some of the issues that I
3 bring up, issues that owners of companies or
4 decision-makers in companies need to look at,
5 are the same kinds of decisions that would be
6 faced by -- that were faced and would be faced
7 by Hodel-Natco and other businesses.

8 But in terms of specifics, I
9 don't know that I can name a specific that --
10 that would apply. There may be some. But I
11 don't know, off the top of my head. It's -- I
12 wrote the book in 1983. It was published in
13 1984. I haven't really gone back and read it
14 in some time.

15 Q. The second publication is,
16 "Seven Critical Areas: Increasing the
17 Effectiveness of Expert Testimony," For The
18 Defense.

19 What was the subject matter of
20 that publication?

21 A. You haven't accurately described
22 what that is. "For the Defense" is a trade
23 publication published, I think, by someone -- I
24 think it's the Defense Research Institute. I'm
25 not sure of the name of the organization. But

1 it's a magazine and web publication that goes
2 to defense attorneys. I believe the market is
3 primarily in the United States.

4 I was asked to put together an
5 article on how lawyers who employ experts
6 should work with those experts in helping them
7 prepare for testimony.

8 Q. Is there anything in that -- in
9 that article that relates to your testimony or
10 bears on your testimony in this case?

11 A. No.

12 Q. Any other publications not
13 listed in your report?

14 A. None within the time period.

15 Q. Have you ever overseen any
16 implementations of SAP Business One?

17 A. I don't believe I have, no.

18 Q. Does your -- your company
19 doesn't actually do software implementa --
20 Business Automation doesn't actually do
21 software implementations, does it?

22 A. No, we don't. That would be a
23 conflict of interest in that some companies
24 provide their own implementation services.
25 Some have business partners who provide those

1 implementation services.

2 If I were to provide that
3 service, as well as a consultant to buyers, I'd
4 have a financial incentive to recommend my own
5 implementation services or to recommend a
6 system which would use my implementation
7 services rather than someone else's.

8 And that could be perceived as a
9 conflict of interest by the various vendors or
10 suppliers and perceived as a conflict of
11 interest by my clients.

12 And my stock-and-trade as a
13 consultant is being able to provide objective
14 advice to clients without conflicts of
15 interest. So I don't do that.

16 Q. I'm going to ask you a few
17 questions about Business Automation, Inc.

18 When was -- when was that
19 company formed?

20 A. I started it in 1980 as a sole
21 proprietorship and then incorporated in 1981.

22 Q. What's your current position
23 with the company, if any?

24 A. I'm the president and owner.

25 Q. How many employees do you have?

1 A. I have -- I'm the only full-time
2 employee. I do employ other consultants on
3 a -- on a contract basis, on a
4 project-by-project basis, as needed.

5 Q. Are you the only employee that
6 provides expert testimony or expert witness
7 services?

8 A. No.

9 Q. You also --

10 A. I'm the only actual -- excuse
11 me. I'm the only actual employee. From time
12 to time, the subcontractors that I've used,
13 some of them have given testimony and some of
14 them have not, depending on the particular
15 issues and their particular expertise and
16 what -- what part of the project I engage them
17 to -- to do.

18 Q. Okay. I took a look at your
19 company's website and it listed four areas of
20 consulting services you provide. One was
21 computer information systems. The second was
22 Internet strategy consulting. The third was
23 expert litigation services. And the fourth was
24 speaking engagements.

25 Is that accurate, to the best of

1 your recollection, as to what your company
2 does?

3 A. That's accurate as a -- as to
4 what my company has done over the years.

5 I don't do Internet strategy
6 consulting anymore. And I have not been active
7 recently in the professional speaking.

8 And most of my work these days
9 is the expert witness services.

10 Q. Do you offer any services that
11 fall outside of those four general categories I
12 just rattled off?

13 A. No.

14 Q. Can you -- over the past year,
15 can you attribute a percentage of your time
16 spent across those four subjects?

17 A. As I've reached my late fifties
18 and sixties, I have focused more and more on
19 the expert witness services because that's
20 where the demand seems to be. Over the past
21 year, that's been the vast majority of what
22 I've done.

23 Q. Can you put a percentage on it?

24 A. Probably in excess of

25 90 percent.

1 Q. Okay. How about over the past
2 five years, what percentage of your time has
3 been spent providing expert witness testimony?

4 A. In excess of 80 percent.

5 Q. How about as a percentage of
6 your business income over the past year, how
7 much would you attribute of that to your
8 services as an expert witness versus other
9 aspects of your business?

10 A. The same as the percentage of
11 the -- of the time.

12 Q. So in excess of 90 over the past
13 year and in excess of 80 over the past five
14 years?

15 A. Yes.

16 Q. Over the past five years, how
17 much of your time has been spent on the
18 selection or implementation of ERP software?

19 A. Not very much. I'm 66 years
20 old. And as I say, starting around 2000, when
21 I was in my mid-fifties, I -- and then with the
22 advent of the -- of the Internet, the demand
23 for my expert services and the fact that I had
24 the experience doing that sort of work and a
25 lot of other folks didn't, really has driven me

1 more and more toward -- toward that area of
2 the -- of the consulting services.

3 So the vast majority of my -- up
4 to 2000, the majority of my -- of my time was
5 the consulting to businesses. Starting in
6 2000, I think more than half was -- has been
7 expert services. And from about 2005 on, it's
8 been the -- the vast majority.

9 Q. Have you ever had any speaking
10 engagements on the -- relating to the selection
11 or implementation of ERP software?

12 A. Yes. I used to do that
13 regularly in the late 1980s and 1990s.

14 Q. Nothing since the 1990s?

15 A. Pardon me?

16 Q. No speaking engagements relating
17 to ERP software since the 1990s?

18 A. Not that I recall. There may
19 have been one or two, but I don't -- I don't
20 recall specifically.

21 Q. Have you ever been involved in
22 consulting or selecting the ERP system for a
23 microvertical industry?

24 A. Yes. That's almost entirely
25 what I did from 1980 to 2000.

1 Q. Are you currently employed by or
2 receiving --

3 A. And some -- and it tailed off
4 after 2000. But I continued doing it after
5 2000.

6 Q. Are you currently employed by or
7 receiving income from any other businesses
8 outside of Business Automation?

9 A. I have a -- well, my brothers
10 and I own some property that throws off income.

11 Q. Okay. Before I move on, do you
12 recall the name of the case where -- we talked
13 about earlier where there was a Daubert
14 challenge to your testimony?

15 A. I think it was Jerome's
16 Furniture versus Red Prairie or it could have
17 been Red Prairie versus Jerome's Furniture.

18 I do have a letter from the
19 attorney that engaged me in San Diego that I
20 could provide to counsel on that -- relating to
21 that engagement that explains it. And
22 certainly I believe you can -- you can look it
23 up. It may be on Pacer or something.

24 Q. Do you recall where that
25 litigation was venued?

1 A. San Diego, California.

2 Q. Was it in federal court?

3 A. I don't recall. It probably
4 was, because it was a Daubert challenge. I
5 don't think California had Daubert at the time,
6 but I'm not sure.

7 Q. Any of the seminars or webinars
8 you attended, did any of those relate to SAP
9 Business One?

10 A. It may have. I don't recall any
11 specifics that related to Business One. There
12 may have been.

13 Q. Have you ever served as an
14 expert witness for SAP prior to this
15 engagement?

16 A. No.

17 Q. Have you ever provided any
18 consulting services or other services to SAP?

19 A. No. I don't provide consulting
20 services to vendors. And I'm -- I'm not
21 engaged by SAP. In this case, I'm engaged by
22 Drinker Biddle.

23 I -- once again, to preserve my
24 independence and objectivity, I don't accept
25 engagements directly from vendors or suppliers

1 of computer systems or computer products or
2 services.

3 Q. Have you ever been engaged by
4 the Drinker Biddle firm prior to this matter?

5 A. No. This is the first time I've
6 been engaged by Drinker Biddle.

7 Q. Can you give me a general
8 background on your experience with SAP Business
9 One?

10 A. Certainly. As a consultant, I
11 had clients where we looked at Business One as
12 an option for them, including -- I'm trying to
13 remember the name -- a company that made
14 specialty vehicles. They actually took tank
15 trucks and outfitted them for -- modified them
16 to -- for dust suppression, to spray water.

17 They did this modification to
18 vehicles in -- they were based in Phoenix.
19 They sold the products throughout the -- the
20 modified vehicles throughout the United States
21 and some internationally.

22 I actually was -- we got to the
23 point of recommendation and I was about to
24 recommend Business One. But then the company
25 suffered some financial -- well, there were

1 some financial and political issues that they
2 became very involved with, Arizona-specific
3 issues. And they put off that acquisition and
4 kept their existing system.

5 I also looked at Business One in
6 other cases, in other client situations. I
7 can't recall the specifics. I think the one
8 that I just mentioned is United Truck, if I
9 recall the name correctly.

10 I looked at it in other
11 situations, but didn't -- wasn't on the point
12 of selecting it.

13 And then as an expert, I was
14 engaged in a case in North Carolina which dealt
15 with a Business One implementation. The
16 lawsuit -- Business One or SAP was not a party
17 to the lawsuit. The company was Kemp
18 Furniture. And they were suing the McGladrey
19 accounting firm and another implementer for the
20 implementation of Business One.

21 I was engaged by counsel for the
22 furniture company in North Carolina. That -- I
23 did produce a preliminary report in that case.
24 And then the case was subsequently settled
25 before -- before I produced a final report.

1 I think that's the only other
2 expert engagement I've had involving Business
3 One.

4 Q. Okay. I want to ask a little
5 bit about that expert engagement.

6 When was that engagement?

7 A. I believe it was about five
8 years ago. I -- I don't know off the top of my
9 head, but on the order of five years ago.

10 Q. Do you recall the -- the claims
11 that were being made by the furniture company
12 in that case?

13 A. They involved functionality that
14 the implementer had -- had promised to deliver
15 and was unable to deliver. I believe
16 subsequently, they engaged another implementer
17 and were able to get that functionality
18 successfully developed.

19 Q. Was it a Business One
20 functionality or an add-on functionality?

21 A. Add-on functionality.

22 Q. Were there any claims in that
23 case that the Business One software itself did
24 not perform?

25 A. No. SAP was not a party to that

1 case. There were no -- there was no indication
2 at all that the Business One software did not
3 perform.

4 Q. Can you give me an overview of
5 that -- of the furniture company's environment
6 in terms of number of users, transacted volume,
7 things that we're addressing in this case?

8 A. I believe they had two
9 locations. I don't recall the number of users.

10 Q. Was it a high transaction volume
11 business or -- or something different than
12 that?

13 A. I -- I -- I don't recall. I
14 just don't recall the -- the transaction
15 volume.

16 Q. What was the subject matter of
17 your report?

18 A. Well, it was a preliminary
19 report. There had been no -- no substantial
20 discovery at the time. The -- so there were no
21 depositions. There were no documents from
22 McGladrey. There were -- nothing from the
23 opposing party.

24 I went to the furniture company.
25 I spoke to their employees. I -- and I

1 produced, as I say, a preliminary report that
2 contained areas of interest where I expected
3 that had the suit proceeded, I might well have
4 had opinions, but I didn't actually state any
5 opinions.

6 The hope at the time, I believe,
7 was that a settlement could be reached, and it
8 was.

9 Q. Was litigation actually -- was a
10 complaint actually filed by the furniture
11 company or was it resolved pre-suit?

12 A. I don't recall.

13 Q. The trucking company -- the
14 United Trucking Company, you said, was looking
15 at Business One and ultimately did not replace
16 its legacy system.

17 Do you recall anything about the
18 customer's environment in that case?

19 A. A bit.

20 Q. How many -- how many users were
21 they looking at, Business One users?

22 A. To the best of my recollection,
23 40 or 50.

24 Q. Do you recall anything about
25 their business environment, transaction volume?

1 A. Pardon me?

2 Q. Anything about their transaction
3 volume or other environment that would have
4 impacted the implementation?

5 A. Yes. They actually had a --
6 quite a complex business in that it was both a
7 manufacturing business and it was a
8 make-to-order manufacturing business, as well
9 as a distribution business.

10 They would take orders from --
11 their customers were largely construction
12 companies. They would have -- they would
13 configure the modifications they were going to
14 do to the vehicles to order, how many nozzles,
15 how big a tank and so forth.

16 There were a number of --
17 whether they were going to make the
18 modifications to a used vehicle, whether they
19 were going to supply the vehicle, what type of
20 vehicle it was and so forth.

21 There were a lot of different
22 types of customizations that -- it's United
23 Truck, if I recall the name of the company
24 correctly -- that they would make to the
25 vehicles.

1 They then needed to track the
2 progress of -- of the building and finishing of
3 that vehicle from start to finish, including
4 adding on quite a number of additional
5 components that were not standard on the -- on
6 the vehicle.

7 In addition to that, because
8 they had a large install base of customers who
9 had bought vehicles from them throughout the
10 country in the past and also from competitors,
11 they had a distributorship where they
12 distributed replacement and repair parts for
13 vehicles that they had built or that their
14 competitors had built. And they had several
15 thousand SKUs of parts.

16 They -- it was complex, also, in
17 that they relied on the same parts inventory
18 both for their manufacturing and for their
19 distribution business. And it could be very
20 complex in that some of the items in the -- in
21 their inventory were long lead time items, some
22 were short lead time items.

23 When they'd get a -- an order
24 from a client for one or more vehicles, it
25 would take them, as I recall, on the order of a

1 minimum of six weeks and a maximum of three or
2 four months to build a vehicle.

3 When they took the order, they
4 knew what parts they were going to require, but
5 the -- the actual usage of those parts was
6 phased over the manufacturing process. And so
7 they had to reserve parts in the joint
8 inventory, which then could become -- there
9 could be a demand on as replacement parts by --
10 for their distribution business.

11 So it was actually a very
12 complex company for a company of its size
13 because of this combination of manufacturing
14 and distribution and the interaction with the
15 inventory.

16 And they were --

17 Q. Let me stop you there. My
18 question was a little more specific than that.
19 And it relates to some of the aspects of your
20 report where you addressed Hodell's transaction
21 volume and database size and things like that.

22 Do you have any knowledge of
23 United Truck's transaction volume and database
24 size and how it would compare to that of
25 Hodell?

<p style="text-align: right;">Page 42</p> <p>1 A. I don't recall. I believe the 2 database size would -- would be roughly 3 comparable, although I believe United Truck is 4 a small -- has a smaller annual revenue than 5 Hodell, may have been somewhat fewer -- well, 6 you know, I don't know. It was a very 7 extensive inventory with a lot of different 8 kinds of parts. 9 So the inventory -- the number 10 of SKUs in inventory could well have been the 11 same. But -- but I don't -- I don't recall, 12 off the top of my head, what the -- what the 13 comparison would be. 14 Q. Okay. How many expert 15 engagements do you have ongoing currently other 16 than this one? 17 A. Six or eight. 18 MR. LAMBERT: Greg, do you have 19 a copy of the report we can mark now? 20 Let's mark that as 462. 21 --- 22 (Whereupon, the court reporter 23 marked for identification Exhibit 462.) 24 --- 25 BY MR. LAMBERT:</p>	<p style="text-align: right;">Page 44</p> <p>1 hour; is that correct? 2 A. I believe so, yes. 3 Q. Is that -- is that a standard 4 rate across your engagements or is that 5 different from your standard rate? 6 A. I take engagements at different 7 points in time. I will hold a rate for a 8 client if an engagement lasts for a long period 9 of time. 10 This is my current rate today 11 for new engagements, but I do have existing 12 engagements where -- which have lower rates. 13 Q. Are they lower because the 14 engagements began when you had a lower standard 15 rate or is there a reason that the rate's 16 different? 17 A. Actually, I do some eDiscovery 18 consulting. Most of that work is done by an 19 associate of mine, a Mr. Schnur. His rate is 20 considerably below mine. And just because of 21 the nature of that work, my rate on those 22 engagements is lower. It's a different type of 23 work. 24 But by and large, you know, I -- 25 I stick by my -- by my standard rate. It can</p>
<p style="text-align: right;">Page 43</p> <p>1 Q. Mr. Hilliard, the -- the court 2 reporter has handed you what's been marked as 3 Exhibit 462. 4 Is that a true and accurate copy 5 of your expert report you submitted in this 6 case? 7 A. Well, I haven't compared it page 8 by page, but it appears to be. 9 Q. Okay. If you notice any -- 10 we're going to go through it, so if you notice 11 anything that would, in your opinion, make it 12 not a true and accurate copy, please let me 13 know. Okay? 14 A. Certainly. 15 Q. Does that report contain all of 16 the opinions you intend to offer at the trial 17 in this case? 18 A. At this time, as far as I know, 19 it does. I haven't been asked to look into 20 anything -- anything else. 21 Q. Okay. I want to go a little 22 bit -- I'm going to go through the report, kind 23 of. We'll just go through it in order. 24 You stated that your 25 compensation for this engagement was 475 an</p>	<p style="text-align: right;">Page 45</p> <p>1 at times vary. I've done some pro bono work 2 and so forth. There have been times where I've 3 done work for -- where an insurance company had 4 a maximum that they would pay and I agree to 5 take the engagement at that rate. But it's -- 6 it's not been below 450. 7 Q. Have you ever actually 8 personally utilized or used the Business One 9 software? 10 A. No. 11 Q. Have you ever looked at the 12 Business One code? 13 A. No. 14 Q. Would you turn to Page 4 and 5 15 of your opinion -- or of your -- of your 16 report. 17 A. I'm there. 18 Q. Are those the only opinion -- 19 are those the only opinions you have with 20 respect to this litigation, opinions one 21 through eight? 22 A. I believe in my cover letter, I 23 reserve the right to extend or amend my -- my 24 investigation. And it's certainly conceivable 25 that additional issues could come up where I</p>

12 (Pages 42 to 45)

1 would take that opportunity that I reserve.

2 But at this time, there are no
3 other areas that I've been asked to look into.
4 And I have no plans to look into or extend my
5 opinions beyond these eight opinions that I
6 have here.

7 Q. Okay. I want to ask you a
8 couple of questions about the "Procedures"
9 section of your report.

10 In the second paragraph, you
11 make a statement, "It is my normal practice,
12 when rendering opinions in legal matters, to
13 use a rigorous and standardized methodology,
14 and that is what I have done here."

15 Do you see that statement?

16 A. Yes.

17 Q. What is the "standardized
18 methodology" you're referring to there?

19 A. Well, actually, you asked me
20 earlier about my book, "Buying a Computer for
21 Your Growing Business: An Insider's Guide."
22 And it is basically the same methodology that
23 I've used as a consultant from 1980 to the
24 present.

25 Now, as I indicated when we

1 talked about that, not every issue that is
2 dealt with -- that one deals with in selecting
3 a computer system is relevant in every
4 engagement, and not -- not necessarily all of
5 them are relevant here. And, also, because
6 this takes place after the fact rather than in
7 anticipation of making a decision on software,
8 certain of the processes have to be modified.

9 But basically it starts out with
10 understanding, in this case forensically from
11 the documents, what the needs of the user are,
12 understanding the functionality that was
13 offered and committed to Hodell-Natco by LSi,
14 and analyzing the fit between them and going on
15 through the implementation, basically skipping
16 over the portions on selection and contract
17 negotiation, although I believe I did look at
18 portions of the contract. Well, there were
19 multiple contracts, obviously, and I did look
20 at them, but there was no negotiation portion
21 associated with it. And then looking at the
22 implementation process that I would look at as
23 a consultant, and how that proceeded, what the
24 results were along the way, what milestones
25 were met and what were not met, what testing

1 was done and so forth during the course of the
2 implementation.

3 I guess I also -- you know, I
4 skipped over the contract portion. There were
5 contract decision issues here in late 2004 and
6 late 2005. And I did review, from looking at
7 those contracts and also reviewing the
8 deposition testimony of those involved in that
9 contracting process, so I did -- I did review
10 that -- those issues pretty thoroughly. Not in
11 the same way that I would as a consultant
12 advising a buyer on negotiation -- how they
13 ought to negotiate a contract, but, rather, as
14 a -- an analysis of the process that took place
15 at the contract -- contracting points in time
16 in late 2004 and late 2005.

17 Q. Well, when you make the
18 statement that this is a standardized
19 methodology, who is it standardized by?

20 A. Well, I mentioned that I wrote
21 this book in 1984. I'm certainly not the only
22 consultant who has written books on the process
23 of acquiring computer systems.

24 There have been numerous
25 articles in the computer and business trade

1 press, most of which are essentially the same
2 as the process that -- that I laid out in my
3 book.

4 So while there is no standard --
5 standardization authority, such as the ISO,
6 that standardizes this process, this is a
7 peer-reviewed process that -- that has been
8 published not only by me, but by others in my
9 field. And also as a consultant, I've had the
10 opportunity to confer with others in my field
11 at consulting organizations and -- and meetings
12 on the process that -- that they use.

13 So it's a consensus process
14 widely used by consultants that do the same
15 kind of work that I've done.

16 Q. Well, if I wanted to find
17 support for your assertion that this is
18 standardized methodology that's been
19 peer-reviewed and tested, where could I find
20 that?

21 A. I didn't say it had been tested.
22 But you could certainly search in many of the
23 business and trade publications, such as
24 Computer World, Business Week. There are a
25 number of business and computer industry trade

<p style="text-align: right;">Page 50</p> <p>1 publications that have had -- outlined -- and 2 in addition to those, actually more than those, 3 there have been publications in a lot of 4 individual industry trade publications by other 5 consultants essentially outlining the same 6 process that I use and that I laid out in my 7 book. 8 But you would have to look 9 through the business and industry trade 10 publications that -- that go out to owners and 11 managers of businesses and -- and find the 12 articles. 13 Q. You make the statement in the 14 next sentence, "My methodology follows all 15 industry-accepted guidelines." 16 What guidelines are you 17 referring to there? 18 A. The guidelines that I've seen 19 published not only by myself, but by other -- 20 other consultants who have written in the 21 national and industry business and computer 22 industry trade press. 23 Q. Are those the same consultants 24 and publications you just testified about or is 25 that a different source of information I'd have</p>	<p style="text-align: right;">Page 52</p> <p>1 sources of information that you reviewed in the 2 course of writing your opinion; is that 3 accurate? 4 A. For the most part. If I think 5 of someplace where I differ from that, I'll -- 6 I'll note it. 7 Q. I'm just trying to get an 8 understanding of what you're talking about when 9 you say, "factors." 10 A. Well, I -- I've relied on 11 testimony. I've relied on written 12 documentation. I've relied on recorded 13 communications, electronically recorded 14 communications, such as e-mails and/or letters 15 and proposals. I've relied on direct 16 discussions, where appropriate, with 17 individuals who were involved in this 18 situation. 19 It's the same types of sources 20 that -- that are customarily relied on by 21 experts in cases of this nature. 22 Q. I'm going to turn to Page 8 of 23 your report, where you talk about the business 24 partner relationship. 25 A. Yes.</p>
<p style="text-align: right;">Page 51</p> <p>1 to go to? 2 A. The same. 3 Q. You make the statement on Page 6 4 at the top there, "I rely only on factors that 5 are generally relied upon and considered 6 reliable by experts in my field." 7 What's the basis for that 8 statement? 9 A. The basis for that statement. 10 Well, I've spoken with -- I've spoken with 11 other experts. And I've seen a number of 12 expert reports of other experts. And the -- 13 the sources that I've relied on are the same 14 sources that other experts rely on. 15 The -- you know, I don't know -- 16 I don't know how I can answer -- answer your 17 question any more specifically than that. 18 I'm -- I am -- I've been 19 involved in a number of legal disputes. And 20 I'm aware of the types of documents and 21 resources that experts -- legal experts in this 22 field rely on. And those are the same kinds of 23 documents and sources that I rely on. 24 Q. Okay. So when you say, "I rely 25 on factors," you're really referring to the</p>	<p style="text-align: right;">Page 53</p> <p>1 Q. Do you have any legal training, 2 any formal legal training? 3 A. No. 4 Q. Do you have any background in 5 the law or the legal profession, other than 6 testifying as an expert? 7 A. Well, my wife is a retired 8 judge. 9 Q. Okay. But you yourself 10 personally don't have any background in the law 11 other than testifying as an expert, correct? 12 A. I confer with my wife on things 13 from time to time. 14 Q. Did you confer with your wife in 15 the process of drafting this report? 16 A. No. 17 Q. Have you performed any legal 18 research as part of preparing this opinion? 19 A. No. 20 Q. Did you ask your wife to perform 21 the legal research in the course of preparing 22 this opinion? 23 A. No. 24 Q. Do you have an understanding of 25 the law of agency?</p>

14 (Pages 50 to 53)

1 A. I have some level of
2 understanding as it relates to transactions of
3 this type. But I wouldn't consider that to be
4 a legal understanding of -- of agency.

5 If I were called upon as a
6 consultant, I would refer my -- for a legal
7 understanding, I would refer my client to their
8 own counsel.

9 Q. Well, what's your understanding
10 of an agency relationship?

11 MR. STAR: Objection to the
12 form. He's just testified that he's not
13 offering an opinion on that. He is not
14 engaged as a legal expert. And I don't
15 think it's an appropriate question.

16 If you want to stay within the
17 scope of his expert report, then you can
18 do that. This is outside of that. He
19 has not offered an opinion on a legal
20 issue.

21 THE WITNESS: Should I answer?

22 MR. LAMBERT: We can move on.

23 BY MR. LAMBERT:

24 Q. In reference to the business
25 partner term, you make the statement, "This

1 term is widely recognized in business as having
2 an entirely different meaning than the term
3 'partnership' used in an accounting or tax
4 context."

5 Do you see that statement?

6 A. Yes.

7 Q. When you say, "widely
8 recognized," who is it widely recognized by?

9 A. Well, as I understand it, in an
10 accounting or tax relationship, there is a -- a
11 formal governmental designation of what is and
12 what is not a partnership.

13 There have been numerous
14 publications, books and trade -- and business
15 trade publications, talking about the business
16 partner -- what's called the business partner
17 relationship and how it differs from the legal
18 relationship of -- of one company forming a
19 legal partnership with another.

20 It's a much more informal
21 relationship. Most vendors, such as SAP and
22 its competitors, have a description on their
23 website as to what their partner -- their
24 business partner relationships are. And it's
25 not the same as a formal partnership for -- for

1 tax purposes. I've reviewed those.

2 Also, before I got into
3 consulting, as a -- as a marketer for both
4 Linolex and Sanders, part of my responsibility
5 was recruiting -- I'm not sure that the term
6 "business partner" was as widely used then as
7 it is now -- but recruiting organizations that
8 would develop particular industry markets for
9 our products and sell our products into those
10 industry markets. And that is the precise
11 relationship that today is most widely referred
12 to as a -- a business partner relationship.

13 I've also seen -- well, I've
14 seen a number of contracts during the course of
15 my work as an expert between developers and
16 business partners. So -- and, basically, all
17 of those experiences have -- have distinguished
18 the business partner relationship as being
19 different from a formal legal partnership
20 relationship.

21 Q. What's your basis for making
22 that statement, though, if you don't have any
23 legal training or background?

24 MR. STAR: Objection to the form
25 of the question. It's argumentative.

1 You can answer it if you
2 understand it.

3 A. I understand from a taxpayer's
4 standpoint what a legal partnership is. I have
5 a legal partnership with my brothers, as I
6 mentioned to you. And I've been involved as an
7 investor in other legal partnerships. So I'm
8 aware of -- of what a legal partnership is, at
9 least from a tax standpoint.

10 I've also, as I mentioned
11 previously, seen documents and numerous
12 publications talking about the -- the term
13 "business partner" as it's used in the computer
14 industry, where some of them written by legal
15 experts, distinguishing the business partner
16 relationship, as that term is used in this
17 industry, from a legal or a -- a partnership
18 for -- for tax purposes.

19 So I have seen that distinction
20 both as an investor in partnerships and as an
21 industry -- an investor in legal partnerships
22 and as an industry expert in the computer
23 industry where the term "business partner" is
24 used and, in almost every case, routinely
25 described as being different than a legal or

1 tax partnership.

2 BY MR. LAMBERT:

3 Q. So you're talking about in a tax
4 context, is primarily what you're focusing on,
5 is the distinction between business partner in
6 this particular case and the business partner
7 in general. Is that your --

8 A. To the --

9 Q. Is that your testimony?

10 A. To the best of my understanding,
11 there are federal -- and I'm not a lawyer, but
12 to the best of my understanding, there are
13 federal codes defining what a partnership is
14 and what partners are.

15 And -- and while I haven't
16 analyzed those from a legal point of view, I am
17 aware that that description that's in federal
18 code and may also be in state code, I'm aware
19 that that relationship is different from what a
20 business partner relationship is in this -- as
21 that term is used in this industry.

22 Q. The only -- only publication,
23 for lack of a better word, that you cite with
24 respect to what a business partner is, is this
25 Wikipedia entry, though; isn't that correct?

1 A. Yes. And I cited that for a --
2 for a specific -- I typically would not cite
3 Wikipedia. But I cited it in this case for a
4 particular purpose.

5 Q. What was the purpose?

6 A. Well, I think while Wikipedia is
7 not particularly reliable or can't be
8 necessarily relied on for specific facts, it is
9 a good source of coalescing industry consensus.
10 And I thought that the definition given in
11 Wikipedia was consistent with -- and I believe
12 it's footnoted in Wikipedia with sources, but
13 it's consistent with the definition that is
14 widely -- that I've heard widely used, that
15 I've seen on -- on vendor websites and that
16 I've seen described in industry publications.

17 So I found -- I used it
18 specifically because it was a good summary of
19 the wide variety of publications of what the
20 industry understanding of this is. This isn't
21 a fact. I'm talking basically about an
22 industry understanding.

23 Q. Is there anything in this
24 summation of the term "business partner" from
25 Wikipedia that you don't agree with?

1 (Pause)

2 A. No. I think it's a good
3 summary. And it also makes a distinction I
4 note between --

5 Q. Why didn't you cite --

6 A. -- between business partner and
7 formal partnership.

8 Q. Why didn't you cite any of those
9 other legal or -- publications that you said
10 you reviewed in support of this opinion?

11 A. Well, I didn't specifically
12 review any others particularly for this
13 engagement. I cited this one because it was
14 a -- a very good explanation and a
15 comprehensive summary of what I've known as
16 an -- as an expert in this industry and as a
17 participant in this industry since the 1960s up
18 to the present. And it -- it probably
19 explained the concept of business partnership
20 as well or better than any other definition
21 that I had ever seen.

22 Q. Okay. Do you recall the names
23 of any of those other publications that you
24 were referencing earlier?

25 A. Well, I know, for instance, the

1 Oracle website and the SAP website both have
2 definitions of business partners on them
3 specifically.

4 In terms of other publications,
5 I don't recall the names of them off the top of
6 my head, but those would be two good ones.

7 I believe Microsoft also --

8 Q. What's the SAP --

9 A. I believe the Microsoft website
10 also has a definition, but --

11 Q. What's the SAP website's
12 definition?

13 A. I don't recall, off the top of
14 my head, but it's consistent with the Wikipedia
15 summary.

16 Q. On Page 10 of your report, you
17 make the statement -- it's in -- there's a
18 heading, "The nature of Business One." And in
19 the second paragraph you state that, "Business
20 One product is comparable to its other ERP
21 products, including MySAP and R/3."

22 What do you mean by
23 "comparable"?

24 A. The types of functionality
25 offered by Business One are of the same nature,

perhaps not as extensive, but of comparable nature to the other SAP ERP products.

Q. And then there's three bullet points there. The last one states that -- and I'll summarize it -- Business One is designed for faster and easier implementation than other ERP packages.

What do you mean by that?

A. Because Business One is focused on the small-medium business market, the SMB market, which doesn't have the same complexity of needs of multi-national corporations, for example, and because the management of SMB companies doesn't have the level of sophistication that is often found in larger companies that use SAP's other ERP, and by that I mean enterprise resource planning, products, Business One is focused on a simpler implementation process that can be done by a less sophisticated customer and done at lower cost than would typically be the case with MySAP or R/3.

Q. On Page 11 --

THE WITNESS: By the way, we've been -- we've been going for about an

hour and a half. When you reach the end of a line of questioning, perhaps a break might be in order.

MR. LAMBERT: Yes.

THE WITNESS: It doesn't have to be right now.

MR. LAMBERT: I don't want to take a long one. We don't have a lot of time with you. This is taking a little longer than I thought it was going to. So we can take one now, though.

THE VIDEO TECHNICIAN: Going off the record at 10:38. This will end tape number one.

(Whereupon, a recess was taken from 10:38 a.m. to 10:47 a.m.)

THE VIDEO TECHNICIAN: The time now is 10:47. Back on the record. Beginning of tape number two.

BY MR. LAMBERT:

Q. Mr. Hilliard, before we broke, I asked you to look at Page 11 of your report where there's a discussion about add-on

products.

A. I'm at Page 11.

Q. Okay. You make the statement about a major drawback of add-ons being that they interrupt the natural processing flow in the base software.

Do you see that statement?

A. I recall writing something to that effect, but I don't recall exactly where that is on the page.

Q. It's on the second full paragraph. It starts, "There is one major drawback to the use of add-ons."

A. Oh, yes. Okay, I'm there.

Q. What -- what about add-ons creates these performance slowdowns or other problems that you reference in that sentence?

MR. STAR: Objection to the form.

Go ahead.

A. Well, I didn't say they always do. I said they can. And it's because they are not something that are -- that was necessarily in -- I'm talking about the industry in general here, not about this

specific situation.

But add-ons are not -- in general, are not something that the original developer of the software did or could have envisioned, at least in -- in many cases. And there is the potential, because it is -- the add-on software is, in fact, added, that the amount of -- the way that the add-on interfaces with the base software, the way that the processing time required to execute the -- the code in the add-ons, the way the add-ons affect the data that's used by the base software, there are a number of -- of things that add-ons can do that would result in, from an end user standpoint, a difference in the -- in the performance in -- as I say, in terms of --

BY MR. LAMBERT:

Q. Well, you make the statement in here --

MR. STAR: He's not done his answer.

BY MR. LAMBERT:

Q. You make the statement in here --

MR. STAR: Whoa, whoa, whoa.

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1 MR. LAMBERT: I'm sorry.

2 MR. STAR: He wasn't done.

3 MR. LAMBERT: Okay.

4 A. And I -- yeah, I was saying
5 there are a number of things that it could do
6 that -- that create a risk, not necessarily a
7 certainty, of slowdowns or other problems
8 related to processing time of the add-ons,
9 changes to the database, interface issues and
10 so forth.

11 BY MR. LAMBERT:

12 Q. You make the statement in this
13 sentence, though, with respect to Business One
14 specifically.

15 Is there something specific
16 about Business One that you were addressing?

17 A. It would be the same for add-ons
18 to any other business software. I reference
19 Business One because that's what was at issue
20 in this case.

21 But -- but these same issues
22 would come up with any ERP type or other
23 business software that had add-ons.

24 Q. Well, isn't one of the features
25 that Business One has advertised as having as

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1 being the ability to accommodate add-ons to add
2 functionality?

3 MR. STAR: Objection to form.

4 You can answer if you
5 understand.

6 A. All -- all -- all business
7 software -- almost all business software, to --
8 from my experience, makes the claim that
9 it's -- add-ons can add capabilities that the
10 software doesn't inherently have.

11 Not all add-ons cause problems.
12 It just creates a -- an area of risk that --
13 with Business One or any other similar
14 software -- that there's an additional issue of
15 risk that everyone is aware of that occurs
16 whenever you do an add-on.

17 The fact that the software is
18 designed to accept add-ons and has application
19 programming interfaces for add-ons doesn't
20 ameliate -- ameliorate this risk. It --
21 obviously, SAP and other vendors try to make it
22 as smooth as possible to minimize it. But to
23 my knowledge, neither SAP nor anybody claims
24 that the addition of -- of add-ons can be done
25 risk-free.

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1 BY MR. LAMBERT:

2 Q. Well, should the potential
3 problems created by add-ons be disclosed by the
4 software company?

5 MR. STAR: Objection to form.

6 A. I think every -- it's common
7 knowledge that add-ons have -- create a level
8 of risk. That's why the -- the term "plain
9 vanilla" has come into -- into common use.

10 Everybody knows, who -- who has
11 some experience with implementing computer --
12 business computer software, that it's better to
13 be as close to a plain vanilla implementation
14 without add-ons as -- as possible.

15 I -- if this were some factor
16 that was unknown or totally unanticipated by
17 customers of ERP software companies, perhaps
18 there ought to be a specific warning.

19 But -- but the warning of this
20 nature is -- I mean, there's no need for a
21 specific written warning of that because it's
22 common business knowledge. And it's certainly
23 common business knowledge --

24 BY MR. LAMBERT:

25 Q. What's your basis for --

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1 A. -- for companies that have
2 implemented a sophisticated business software
3 in the past.

4 Q. What's your basis for the
5 statement that that risk is common business
6 knowledge? Can you point me to anything?

7 A. Yeah. Do a Google search on
8 plain vanilla.

9 Q. So your -- the basis for that
10 statement that it's common knowledge would be
11 for me to perform a Google search; is that
12 your --

13 A. Well, that certainly --

14 MR. STAR: He already answered.

15 Objection to form.

16 A. (Continuing) That would be --
17 that would be one basis.

18 The -- you can hardly read
19 anything in the business press or in the
20 computer trade press or anything that's been
21 discussed at trade association meetings about
22 the implementation of sophisticated business
23 software to perform enterprise functions that
24 doesn't say keep it as close to standard or,
25 quote, plain vanilla, as possible. Avoid

18 (Pages 66 to 69)

<p style="text-align: right;">Page 70</p> <p>1 making add-ons or modifications to the software 2 because of the risk. 3 Doing the Google search -- 4 BY MR. LAMBERT: 5 Q. You're talking about -- 6 A. I mean, I was kind of flip by 7 saying, "the Google search." But doing that 8 Google search would, in fact, show you how -- 9 how common that knowledge is. 10 Q. In the computer industry, is 11 that your testimony? It's common knowledge in 12 the computer industry? 13 A. No. It's common knowledge -- 14 it's common knowledge among businesses and 15 buyers of computers -- 16 Q. Or to consumers as well? 17 MR. STAR: Let's him finish his 18 questions, Wes -- or let him finish his 19 answers, Wes. 20 MR. LAMBERT: I'm not trying to 21 interrupt him. 22 MR. STAR: Well, you are. 23 MR. LAMBERT: It's just because 24 of the lag in the -- 25 MR. STAR: It's not that you're</p>	<p style="text-align: right;">Page 72</p> <p>1 out those steps? What is that based on? 2 A. I didn't necessarily mean this 3 to be a comprehensive and all-inclusive list of 4 every step that -- that could be used. But the 5 particular steps that I have included here are 6 steps that are distributed by -- steps and/or 7 recommendations that are promulgated by every 8 major software company to its customers. 9 There are books written about 10 these steps, some specifically for SAP 11 software, some specifically for Oracle 12 software, some in general. Most of these steps 13 have also been discussed in industry trade 14 publications. And I'm not talking about the 15 computer industry, I'm talking about there are 16 distribution industry trade publications, 17 manufacturing industry trade publications. 18 These are the steps that are 19 included typically in the process description 20 that software companies, including SAP, 21 including Oracle, including Microsoft and 22 others, give to their clients before going 23 on -- embarking on an implementation of new 24 software. 25 Q. On Page 15, you have an itemized</p>
<p style="text-align: right;">Page 71</p> <p>1 not trying to. You are, in fact, 2 interrupting him. So whether you're 3 trying to or not makes no difference. 4 You're, in fact, interrupting him. Allow 5 him to finish his answer. 6 A. My answer is -- is, your 7 characterization is incorrect. It is not just 8 common knowledge in the computer industry. 9 It's common knowledge among buyers of business 10 software of all sizes. It's common knowledge 11 among users of business software, regardless of 12 their -- of the volume of their business or the 13 size or complexity of their business. 14 And certainly any company that's 15 ever used business software of this type would 16 have that knowledge. It's common knowledge 17 everywhere. 18 BY MR. LAMBERT: 19 Q. Okay. Can you turn to Page 12. 20 A. I'm there. 21 Q. You've got a list of steps in 22 the implementation process. 23 How did you -- how did you -- 24 A. Go ahead. I'm there. 25 Q. How did you arrive at listing</p>	<p style="text-align: right;">Page 73</p> <p>1 list of vendor/implementer responsibilities. 2 A. Yes. 3 Q. In the vendor/implementer -- 4 what do you mean by "vendor/implementer"? Does 5 that including SAP and LSi in this case? 6 A. Well, if you look at the prior 7 page, I talk -- I talk about the implementation 8 having responsibilities on the part of the -- 9 of the client and responsibilities on the part 10 of the vendor and implementer. 11 As -- as I understand this 12 particular situation, SAP's formal involvement 13 as a vendor didn't occur until after the 14 signing of the license agreement at the end of 15 2005. So some of these responsibilities would 16 be strictly LSi's. And some conceivably, to 17 the extent that SAP may have been involved 18 after the beginning of 2005, could apply to SAP 19 as well. Although one has to look at -- at the 20 solution that was ultimately implemented at 21 Hodell-Natco as being an amalgam of a very 22 complex, developed-from-scratch add-on to the 23 Business One software and the Business One 24 itself. 25 Under a circumstance where the</p>

19 (Pages 70 to 73)

<p style="text-align: right;">Page 74</p> <p>1 primary contact between the vendor and the 2 customer up until well after the -- the 3 implementation -- the SAP license agreement had 4 been signed and even continuing after that, the 5 vast majority of the contact was between LSi 6 and Hodell-Natco. So the primary 7 responsibility for almost all of this would 8 fall with LSi.</p> <p>9 It's not inconceivable that some 10 of them -- and we have to look at item by 11 item -- it's not inconceivable that SAP might 12 have some responsibility for some of these.</p> <p>13 But by and large, they were -- 14 SAP was not the entity with the direct contact 15 or the direct responsibility for making -- 16 putting together the amalgam of the LSi and 17 Radio Beacon and Business One solution. That 18 was LSi's responsibility.</p> <p>19 Q. My question was simply, by the 20 term "vendor/implementer," do you mean SAP and 21 LSi or just LSi?</p> <p>22 Let's -- I just want an answer 23 to that.</p> <p>24 A. For the most part, LSi. We 25 could go item by item. There might be --</p>	<p style="text-align: right;">Page 76</p> <p>1 coordination with customer to resolve issues 2 after going live and the ongoing customer and 3 software support, SAP could well have had some 4 subsidiary responsibilities in -- in those 5 areas.</p> <p>6 But even in those areas, the 7 primary responsibility, since we're talking 8 about an amalgam of -- of the LSi what are 9 called In-Flight extensions, or IFE, the Radio 10 Beacon and the Business One, since the -- this 11 amalgam was -- was LSi's responsibility, not 12 SAP's.</p> <p>13 BY MR. LAMBERT:</p> <p>14 Q. Can we turn to your first 15 opinion on Page 17.</p> <p>16 A. Okay.</p> <p>17 Q. Opinion number one is, "The 18 process of partnering between software 19 companies and software implementation firms is 20 done to facilitate client service and support, 21 not to isolate the customer from the software 22 company."</p> <p>23 What is the basis for that 24 opinion?</p> <p>25 A. Well, I -- I've explained the</p>
<p style="text-align: right;">Page 75</p> <p>1 Q. I don't want to go item by item. 2 A. There might be one or two items 3 in here where there -- where there would be 4 some SAP responsibility. But we'd have to look 5 at each item.</p> <p>6 Q. Well, can you point to any of 7 those items and say which one would be SAP's 8 responsibility --</p> <p>9 MR. STAR: Objection.</p> <p>10 BY MR. LAMBERT:</p> <p>11 Q. -- in your opinion?</p> <p>12 MR. STAR: Objection to form. 13 Are you asking him SAP's responsibility 14 perhaps in general or specifically in the 15 context of this case?</p> <p>16 MR. LAMBERT: In this case.</p> <p>17 MR. STAR: Do you understand the 18 question?</p> <p>19 THE WITNESS: I believe I do.</p> <p>20 MR. STAR: Okay.</p> <p>21 A. The one saying -- there are none 22 where SAP would have the primary 23 vendor/implementer responsibility.</p> <p>24 But the support of customer 25 during comprehensive testing, the good faith</p>	<p style="text-align: right;">Page 77</p> <p>1 basis in the following page. I referred back 2 to the industry background that I gave and why 3 it is that SAP and other software vendors 4 utilize business partners, such as LSi, to -- 5 for sales and implementation, because 6 they're -- as I've explained, they're closer to 7 the customer. They're able to provide support 8 more cost effectively and generally at a lower 9 cost, because they can focus on individual 10 customers better than a large company that has 11 to deal with multi-nationals as well as small 12 customers, because they're capable of providing 13 add-on software and doing the configuration of 14 the software as needed.</p> <p>15 It makes sense not to isolate 16 the customer from the software developer, but, 17 rather, to provide a -- a nearby and focused 18 support organization that can deliver a level 19 of support more cost effectively and more 20 locally to the -- to the customer than the 21 software developer itself could.</p> <p>22 Q. You make the statement, "no 23 organization that has ever used an ERP . . . 24 software product . . . would have been able to 25 do so without signing a license agreement."</p>

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<p>1 Do you see that?</p> <p>2 A. I recall having written that. I</p> <p>3 don't see where I -- where it is on -- is it on</p> <p>4 Page 17?</p> <p>5 Q. Yes, at the bottom of the first</p> <p>6 paragraph.</p> <p>7 A. Oh, yes. Oh, I see that.</p> <p>8 Q. How does that -- how do we</p> <p>9 verify that statement?</p> <p>10 A. Experience.</p> <p>11 Q. No organization you've been</p> <p>12 experienced with, right?</p> <p>13 A. I've got to tell you, I've --</p> <p>14 I've been involved in the acquisition of</p> <p>15 literally thousands of software products over</p> <p>16 the past 40 years. I have never seen a</p> <p>17 commercial software package where there was not</p> <p>18 a license to be signed.</p> <p>19 Every single commercial</p> <p>20 software -- there are open source products.</p> <p>21 But even those, many of them have an open</p> <p>22 source agreement. But every commercial</p> <p>23 software package I have ever seen -- and</p> <p>24 I've -- as I say, I've seen thousands of</p> <p>25 them -- all have a license to be signed. That</p>	<p>1 A. Well, I refer back --</p> <p>2 Q. -- your entire opinion number</p> <p>3 one.</p> <p>4 A. Well, no. I refer back to the</p> <p>5 "Industry Background" section which begins</p> <p>6 on --</p> <p>7 Q. Okay.</p> <p>8 A. -- Page 6.</p> <p>9 So I think the -- the support</p> <p>10 for that -- for that opinion goes from Page 6</p> <p>11 through Page 18.</p> <p>12 And as I say, I wouldn't rule</p> <p>13 out that there might be an assumption here or</p> <p>14 there, but none come to mind.</p> <p>15 Q. Well, if one comes to mind, let</p> <p>16 me know. I'm entitled to know what you're</p> <p>17 relying upon in forming this opinion. So if</p> <p>18 there's something that's not in this report</p> <p>19 that you're relying upon on the basis of</p> <p>20 forming opinion number one or any of the other</p> <p>21 opinions we're going to discuss, please let me</p> <p>22 know. Okay?</p> <p>23 A. I -- I'd be --</p> <p>24 MR. STAR: You know what? I</p> <p>25 object to that, Wes. He's answered your</p>
Page 79	Page 81
<p>1 companies license commercial software. They</p> <p>2 don't buy it. And they sign a license</p> <p>3 agreement.</p> <p>4 Q. Have you made any assumptions in</p> <p>5 the process of rendering opinion number one?</p> <p>6 MR. STAR: Objection to form.</p> <p>7 A. Well, I --</p> <p>8 MR. STAR: Take your time and</p> <p>9 read through it, if you need to. He's</p> <p>10 asking you about the entire opinion,</p> <p>11 which covers, in your report, a little</p> <p>12 bit more than a page. So take your time.</p> <p>13 BY MR. LAMBERT:</p> <p>14 Q. I want to know if there's any</p> <p>15 assumptions that you've made in the process of</p> <p>16 rendering opinion number one.</p> <p>17 A. None come to mind, although I</p> <p>18 don't rule out that there might have been an</p> <p>19 assumption.</p> <p>20 Is there something in particular</p> <p>21 you're -- you're concerned about?</p> <p>22 Q. No. I just want to know if</p> <p>23 the -- I mean, I want to know if your entire</p> <p>24 opinion and what you're basing it upon is set</p> <p>25 forth on Pages 17 and 18 --</p>	<p>1 question and that's totally</p> <p>2 argumentative.</p> <p>3 Go ahead and ask an actual</p> <p>4 question.</p> <p>5 THE WITNESS: Should I answer?</p> <p>6 MR. LAMBERT: I'm asking him</p> <p>7 just to let me know --</p> <p>8 MR. STAR: You didn't ask</p> <p>9 anything.</p> <p>10 MR. LAMBERT: -- if there's</p> <p>11 something --</p> <p>12 MR. STAR: You made argument to</p> <p>13 him. And he already answered the</p> <p>14 question.</p> <p>15 Go ahead and ask another one.</p> <p>16 MR. LAMBERT: I'm not arguing.</p> <p>17 I'm saying -- I'm telling him I would</p> <p>18 like to know what he's relying upon in</p> <p>19 rendering this opinion and the others.</p> <p>20 And if there's something, an assumption</p> <p>21 that comes to mind that he used that</p> <p>22 isn't stated in here, I'd like to know</p> <p>23 it. That's all I was saying. I wasn't</p> <p>24 arguing with anyone.</p> <p>25 MR. STAR: Go ahead and ask a</p>

21 (Pages 78 to 81)

1 question.

2 BY MR. LAMBERT:

3 Q. Let's go ahead to opinion number
4 two. It's on Page 18 of your report.

5 A. I'm there.

6 Q. Are there any assumptions not
7 contained in your report that form the basis of
8 opinion number two?

9 A. Well, I can think of one off the
10 top of my head. And I had -- and this is just
11 from the first page. And that is that Hodell's
12 acquisition of the license for FACTS was
13 consistent with the way FACTS normally licenses
14 its software.

15 And as a consultant, I've had
16 clients that have licensed FACTS software. So
17 I -- I assumed that Hodell had to sign a
18 license for FACTS just like every other FACTS
19 user that I'm aware of has had to -- to sign a
20 license. That's an assumption.

21 Q. Okay. Any others?

22 A. I'm going -- I'm moving forward.

23 I -- I list an understanding of
24 the meaning of the memorandum opinion that I've
25 cited in -- in footnote 16. I'm assuming that

1 my understanding, as I've characterized it in
2 that sentence, is correct.

3 Q. Okay. Any other assumptions?

4 A. I'm -- I'm proceeding.

5 Q. Okay.

6 (Pause)

7 A. Those are the only two that --
8 that I'm able to identify on reading it. In
9 most cases, I rely on facts or documents. And
10 I think I have amply footnoted what facts and
11 documents I've relied on.

12 Q. Okay. And let's try -- I'll try
13 to speed this up so we can get you on your
14 flight home.

15 A. Thank you.

16 Q. You cite -- for a lot of the
17 factual propositions in your report, you
18 footnote what you referred to or what documents
19 you referred to, correct?

20 A. Yes.

21 Q. Is it fair for me -- is it fair
22 for us to agree that if you footnoted a
23 particular document, that is the document
24 you're relying on for that particular
25 assertion?

1 A. In -- in some cases, it's an
2 exemplary document. There may be others as
3 well. And it's not necessarily -- so it's not
4 necessarily the only or best document that --
5 that might support it. But I felt in every
6 case, it's -- it was an adequate support and it
7 was, if not the only support, exemplary of the
8 other -- of other documents.

9 Q. How would I determine what other
10 documents you're relying upon to make such a
11 statement if it's not referenced in here?

12 A. Ask me. Ask me a question.
13 Show me a document and -- and -- and let me
14 know whether -- ask me whether it's one that I
15 saw or considered.

16 Q. Well, I'll represent to you
17 there's been hundreds of thousands of pages of
18 documents produced in this case. That's just
19 not feasible. And we could be here all day if
20 you want to do it that way.

21 But I'm trying to determine what
22 you're relying upon in order to reach some of
23 the conclusions you've -- you've made in here.
24 And I'm trying to determine if the document
25 that you footnoted in your report is what you

1 relied upon or if there's something outside of
2 your report that you're relying upon.

3 A. In -- in every case, the
4 document I footnoted is adequate support.

5 Certainly if you were to ask me
6 a detailed question about any particular item
7 in my report and ask me for some additional
8 level of understanding, I might need to
9 research what other documents or testimony I --
10 I viewed that -- that had an effect on it.

11 But in every case, I -- it is
12 safe to assume that I believe that the
13 footnoted reference is adequate support for
14 the -- the particular statement or the
15 particular fact that I've -- that I've stated.

16 But, for instance, if I've
17 referred to a deposition, I may have referred
18 to one place in the deposition or two places in
19 the deposition, but I haven't necessarily
20 referred to every single reference in that
21 particular definition (sic) to -- even though I
22 read the entire deposition.

23 MR. STAR: You said
24 "definition." You meant deposition?

25 THE WITNESS: Deposition, yes.

1 A. (Continuing) I haven't
2 necessarily read -- referenced every single
3 reference in the deposition to that particular
4 issue. But I tried to reference one or more
5 places that were sufficient support.

6 BY MR. LAMBERT:

7 Q. Okay. I'm not as concerned with
8 the deposition testimony as much as I am with
9 the documents, the Bates labeled documents,
10 you've cited.

11 A. The same thing would apply,
12 however.

13 Q. Okay. Is the basis for your
14 opinion number two -- and, again, I'm trying to
15 speed this up a little bit -- understanding
16 that there are some prefatory statements made
17 in the prior parts of the opinion, is the basis
18 for opinion number two as set forth on Pages 18
19 through 22 of your report?

20 A. I don't understand. Could you
21 rephrase that question? I'm not sure I
22 understood what you were asking.

23 Q. Understanding that you've
24 testified that some of the bases of your
25 opinions are included in the prefatory parts of

1 your report -- okay?

2 A. Okay.

3 Q. -- is the -- other than that, is
4 the entire basis for your opinion number two
5 completely set forth and contained in Pages 18
6 through 23 -- 22 of your report or is there
7 somewhere else I should look?

8 A. I -- the entire basis is the
9 re -- is contained in -- primarily in the pages
10 leading up to opinion two. I -- there might be
11 something in a later opinion that also bears on
12 this.

13 But by and large, you can assume
14 that -- that for the statement I've made, that
15 the basis for that statement is specified and
16 explained on Pages 18 through 22 and the
17 footnoted documents and testimony on those
18 pages.

19 If you were to ask me for some
20 clarification on something or some greater
21 depth of detail on something I've -- I've
22 stated there, it's certainly conceivable that
23 in order to provide that clarification or a
24 greater depth than what I've actually stated, I
25 might need to refer to other documents or other

1 testimony. But for what I've stated, the
2 support is here.

3 Q. Okay. And that's all I'm trying
4 to get an understanding of, without asking you
5 what every single word on this report means.
6 I'm trying to get an understanding of if
7 there's something -- a conclusion or an opinion
8 rendered in this report, if there's -- if
9 you're relying upon or basing it upon something
10 that isn't noted in the document. Okay?

11 A. Okay. I -- I -- I looked at
12 plaintiff's expert's report. And I think I
13 have given a more detailed explanation of the
14 support for my statements, considerably more
15 detailed, than plaintiff's expert.

16 Q. Okay. Let's move on to the
17 third opinion on Page 22. "There is no
18 supportable basis for Mr. Gumbel's assertion
19 that SAP's Business One ERP software was
20 incapable of scaling up to support a business
21 the size of Hodell."

22 Can you tell me what assumptions
23 you've made in course of rendering that
24 opinion?

25 A. Let me look at it, please.

1 (Pause)

2 MR. STAR: Are we off the
3 record?

4 MR. LAMBERT: No.

5 THE WITNESS: I'm looking for
6 assumptions.

7 (Pause)

8 A. (Continuing) I -- I -- on
9 initial look here, I don't -- I can't identify
10 any particular assumptions that I've made.

11 I'm basically commenting here on
12 the lack of support that Mr. Gumbel has -- has
13 offered. He's made a lot of assertions and
14 without much -- without support that I could
15 identify at all from his report.

16 BY MR. LAMBERT:

17 Q. Okay. And the -- and the basis
18 for your disagreement with Mr. Gumbel is set
19 forth in the exhibits and documents contained
20 on Pages 22 through 25; is that correct?

21 A. Well, actually, since I wrote
22 the report, I have seen an additional document
23 that came up, I believe, in Mr. Kellerman's --

24 MR. STAR: Killingsworth.

25 A. (Continuing) -- Killingsworth's

<p style="text-align: right;">Page 90</p> <p>1 deposition earlier this month, that had I seen 2 that document at the time I wrote my report, I 3 would have cited that document in here as well. 4 That document in particular was a listing of 5 Business One customers that had considerably 6 larger implementations than Hodell that were up 7 and running. I certainly would have -- would 8 have cited that document in this report had I 9 had it. 10 BY MR. LAMBERT: 11 Q. Can you tell me anything about 12 the implementations that are referenced in that 13 document? 14 A. Not beyond what 15 Mr. Killingsworth testified to, no. 16 Q. Well, what about that document 17 do you think would have supported your 18 position -- 19 A. That -- 20 Q. -- in your opinion? 21 A. I'm sorry, I didn't mean to 22 interrupt you. 23 That document -- 24 Q. What is it about that document 25 you thought would have supported your opinion,</p>	<p style="text-align: right;">Page 92</p> <p>1 had been -- has expressed certainly at some 2 point, although I think it wasn't clear -- ever 3 clear that they expressed it prior to 4 contracting. In fact, I've seen no evidence 5 that they expressed it prior to contracting. 6 But that they have subsequently expressed the 7 growth potential that they needed. 8 Those -- that information 9 brought up in that deposition, which occurred 10 after the date of my report, would certainly be 11 something that I would have cited as support 12 for this opinion. 13 Q. Is it your testimony that that 14 document reflected instances where customers 15 were utilizing Business One with hundreds or 16 thousands of concurrent users? 17 A. Yes. 18 Q. Is that what your testimony is? 19 MR. STAR: Objection to the 20 form. 21 MR. LAMBERT: Okay. 22 MR. STAR: Go ahead and answer 23 it. 24 A. It -- it's my understanding that 25 that was a listing of domestic and Canadian</p>
<p style="text-align: right;">Page 91</p> <p>1 opinion number three? 2 A. That document listed large 3 domestic -- and not even including 4 international -- domestic and Canada 5 implementations of Business One that had been 6 scaled to support hundreds and -- or even 7 thousands of users, and were, therefore, much 8 larger than -- than Hodell-Natco ever was 9 during the period of time that it was using the 10 amalgam of the In-Flight Enterprise, the Radio 11 Beacon and Business One. 12 And -- and I believe there was 13 also some testimony there about the potential 14 for future scalability based on the Hanna 15 architecture that would have -- that is 16 becoming available now and certainly would have 17 been available to Hodell-Natco during the 18 ten-year horizon of its -- of its 19 implementation of this amalgam of -- of add-on 20 and -- add-ons and Business One. 21 And I probably would have cited 22 that as well because they both go to show the 23 fact that the Business One scalability 24 potential currently and over the ten-year time 25 horizon certainly encompassed what Hodell-Natco</p>	<p style="text-align: right;">Page 93</p> <p>1 business users, some of whom had several -- 2 many of whom had several hundred and/or over a 3 thousand concurrent users. 4 BY MR. LAMBERT: 5 Q. Okay. Operating on the same 6 Business One's version that Hodell purchased in 7 2004? 8 MR. STAR: Objection to form. 9 A. I -- I did not say that they 10 were operating on the same version. It is 11 normal for users of software such as Business 12 One to upgrade versions as new versions become 13 available. 14 It's certainly not -- it would 15 certainly be expected that Hodell-Natco would 16 have had that opportunity to upgrade its 17 versions just like anybody -- just like anybody 18 else, that there's no stretch there. 19 BY MR. LAMBERT: 20 Q. If you were advising or 21 consulting with a client that had implemented 22 business software and was not able to 23 effectively utilize that software, would you 24 advise them to wait it out in the hope that 25 there would be improvements in the -- or</p>

24 (Pages 90 to 93)

1 upgrades to the software or would you advise
2 them to move on?

3 MR. STAR: Objection to the
4 form.

5 You can answer it if you
6 understand it.

7 A. You have to look on a
8 case-by-case basis and what the issues were.
9 In some cases, I might recommend that they move
10 on. In other cases, I might recommend that --
11 that they stick with it.

12 And in this case, we're not
13 talking about a particular Business One-only
14 implementation. We're talking about an
15 amalgam, a combination of Business One, the IFE
16 add-on and the Radio Beacon add-on.

17 Every case is unique. I can't
18 give you an -- an answer that would apply in
19 any specific case without knowing the details
20 of that case.

21 BY MR. LAMBERT:

22 Q. Is it your testimony, though, in
23 this case, that Hodell, rather than moving to
24 Prophet 21, should have waited out its problems
25 with Business One and on the assumption that

1 the Business One software would be upgraded and
2 improved over time?

3 MR. STAR: Objection to form.

4 A. That's not an issue that I have
5 been asked to look into. But -- but I think I
6 might be able to -- to give you some -- some
7 comment on that.

8 There is certainly a divergence
9 of testimony and opinion as to how satisfactory
10 this software was over the period of time that
11 Hodell-Natco used it.

12 Obviously, any businessperson
13 has the option at any time to decide to stay
14 with something or not to stay with something.
15 That's the business's decision to make.

16 What might be perfectly adequate
17 performance in general might be unacceptable
18 for entirely unusual reasons to any particular
19 business. So you'd have to look at what it --
20 what all the factors would be that would affect
21 this.

22 I'm not in a position to say
23 whether -- whether Hodell-Natco -- whether
24 their dissatisfactions were something that
25 they -- that I would have recommended they wait

1 out or not. A business' dissatisfactions are
2 their own dissatisfactions, whether they're
3 reasonable or -- or unreasonable.

4 We're -- we're not talking
5 specifically about Business One here, however.
6 We're talking about this combination of
7 Business One with the two add-ons. And while
8 Business One's scalability and the potential
9 for growth of Business One, the size of
10 which -- there's no indication that Business
11 One without the add-ons was unsatisfactory for
12 Hodell or unable to perform as -- as it should
13 perform. It's the combination of Business One
14 with these -- with the add-on.

15 There are so many factors that I
16 haven't looked into there that, you know, if it
17 had strictly been the Business One alone wasn't
18 quite as fast as Hodell -- or Hodell had some
19 concern that Business One alone without the
20 add-on would not be able to expand, in the
21 ten-year horizon that they had been concerned
22 about, to the size they might need in that
23 ten-year horizon, understanding that even as of
24 today they've gone -- expanded beyond what they
25 were when they had this combination, it would

1 certainly be reasonable to keep using it with
2 the promise of the Hanna improvements to
3 accommodate the future growth when that future
4 growth occurred.

5 But what the -- what the
6 decision should have been -- what the decision
7 should have been for this combination un --
8 that's -- that's not something that I've got
9 enough information to -- to make a
10 recommendation and haven't -- I don't have an
11 opinion on that. I haven't tried to state an
12 opinion on that.

13 BY MR. LAMBERT:

14 Q. So the short answer to my
15 question is, no, you're not going to offer
16 testimony on that subject at trial?

17 A. I have no plans to offer
18 testimony on whether they should have waited it
19 out at trial.

20 You have to make the distinction
21 between Business One alone, which is the SAP
22 product.

23 Q. I didn't ask that. I just asked
24 a yes or no answer.

25 A. Okay.

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1 MR. STAR: Let's take a break
2 when you've got a minute, when you get to
3 a spot.

4 MR. LAMBERT: Yes. Can we talk
5 for a second, Greg?

6 MR. STAR: Sure.

7 THE VIDEO TECHNICIAN: Off the
8 record?

9 MR. STAR: Yes.

10 THE VIDEO TECHNICIAN: Off the
11 record at 11:40.

12 ---

13 (Whereupon, a recess was taken
14 from 11:40 a.m. to 11:52 a.m.)

15 ---

16 THE VIDEO TECHNICIAN: Back on
17 the record at 11:52. Beginning of tape
18 number three.

19 BY MR. LAMBERT:

20 Q. In the course of rendering
21 opinion number three, did you speak with anyone
22 at SAP for purposes of preparing that
23 particular part of your report?

24 A. I don't recall having done so.
25 I don't believe so.

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1 Q. Okay. Turn to Page 25, opinion
2 number four.

3 A. Okay.

4 Q. Opinion number four is,
5 "Although the SAP Business One software had a
6 marketing focus on smaller companies, that does
7 not imply that it was incapable of running
8 satisfactorily for companies the size of
9 Hodell."

10 Can you tell me what assumptions
11 you made or relied upon in rendering opinion
12 number four?

13 (Pause)

14 A. I don't see any in par -- any in
15 particular, nothing that I haven't -- that I
16 haven't stated.

17 Q. You're not aware of any
18 assumptions that you made in rendering opinion
19 four based upon your review here?

20 A. I may not have stated here,
21 although I did state elsewhere in the report,
22 that -- and earlier in my deposition, that as a
23 marketing -- that I have been a marketing
24 executive for computer products. And I relied
25 to some extent on my knowledge of -- of -- and

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1 experience as a marketer of computer products
2 and -- and reviewing what other marketers of
3 computer products have done. But nothing
4 specific.

5 Q. You're not assuming any facts or
6 evidence in opinion number four that aren't
7 stated in your report; is that accurate?

8 A. I -- I've really tried to
9 footnote all of the facts that I've relied on
10 as best I can. And as I mentioned, in some
11 cases I've used exemplary citations and there
12 are others. But I've really tried my best
13 to -- to identify everything I've relied on.

14 Q. Okay. Can you turn to 28,
15 opinion number five.

16 Again, opinion number five is,
17 "LSi and Hodell's neglect of technical warnings
18 known to one or, in some cases, both of them
19 before and after Hodell licensed the SAP
20 Business One software, without getting normal
21 guidance from SAP and without taking normal and
22 customary actions to avoid potential problems
23 was a major factor causing the SAP Business One
24 software not to perform up to Hodell's
25 expectations."

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1 My question is, is there any --
2 have you made any assumptions in the course of
3 rendering opinion number five that aren't
4 contained in your report?

5 A. Only that the -- in the cases
6 where I relied on testimony of individuals,
7 only that they were testifying accurately and
8 honestly.

9 Q. Okay. And the basis for your
10 opinion number five is as set forth in Pages 28
11 through 30; is that accurate?

12 A. Yes. Yeah, that's why I do
13 this.

14 Q. Okay.

15 MR. STAR: You mean that's why
16 you wrote a report?

17 THE WITNESS: Yes, that's why I
18 write a report with explanation of what
19 the opinions are and footnote the support
20 for that explanation.

21 BY MR. LAMBERT:

22 Q. I'm just trying to get -- you
23 know, again, I'm just trying to get an
24 understanding of what your opinion is and what
25 the basis for it is.

26 (Pages 98 to 101)

<p style="text-align: right;">Page 102</p> <p>1 On Page 30, opinion number six, 2 can you let me know what, if any, assumptions 3 you made or relied upon in rendering opinion 4 number six? 5 A. I'll take a look. 6 (Pause) 7 No. I think I have explained -- 8 I don't see any assumption. I think I've 9 explained the support for opinion number six as 10 best I could and -- and cited the -- the facts, 11 documents and testimony at least with 12 exemplary, but sufficient ex -- citations for 13 the support for that -- that opinion. 14 Q. Okay. Page 34, opinion number 15 seven, the same question: Are there any 16 assumptions that you're making or relying upon 17 in the course of rendering opinion number seven 18 that you want to let me know about? 19 (Pause) 20 A. No assumptions that I can 21 identify. And I believe that the support for 22 the opinion is amply explained and -- and 23 cited. 24 Q. Are you aware of whether Hodell 25 made any changes to its infrastructure hardware</p>	<p style="text-align: right;">Page 104</p> <p>1 were improvements that occurred during the same 2 time period as these infrastructure changes and 3 enhancements occurred. 4 Q. You had a reference in here to 5 an SAP sizing guide. 6 A. I believe so, yes. 7 Q. Do you know whether the 8 equipment that Hodell had installed to run 9 Business One and In-Flight was -- complied with 10 the sizing guide? 11 MR. STAR: Objection to form. 12 I'd also note that notwithstanding our 13 numerous requests, Hodell has 14 continuously refused to produce its 15 internal documentation, including 16 documents from Joe Vislocky, which 17 apparently have been collected and 18 reviewed by counsel, but not ever 19 provided to us. 20 Go ahead and answer. 21 MR. HULME: I'm sorry, could you 22 repeat that? I couldn't hear you, Greg. 23 MR. STAR: Roy, I objected -- 24 MR. LAMBERT: Let's have a 25 discussion -- let's not take up time here</p>
<p style="text-align: right;">Page 103</p> <p>1 capabilities at any time? 2 A. I'm aware that they did, yes. 3 Q. Are you aware of whether that 4 had an effect on the performance of the 5 software solution? 6 A. The documents that I saw 7 indicated that -- that the improvements to the 8 infrastructure did, in fact, result -- well, 9 there were a number of things going on. SAP 10 was providing support. LSi was providing 11 support. Infrastructure changes were going on. 12 All of these things were going 13 on more or less concurrently. And there was 14 noted and notable improvement over the months 15 that followed the go-live in the spring of 16 2007. 17 And in -- you know, how much of 18 that is attributable to the infrastructure -- 19 since it was all going on concurrently, how 20 much of it is attributable to the 21 infrastructure improvements as opposed to 22 the -- the software adjustments and so forth, I 23 don't think I've seen any evidence that would 24 isolate what was attributable to what. 25 But, certainly, there -- there</p>	<p style="text-align: right;">Page 105</p> <p>1 doing that. Let's just -- come on. 2 MR. STAR: Fine. Go ahead. 3 It's on the record. 4 A. I didn't see, nor did Mr. Gumbel 5 note details with regard to the compliance of 6 the infrastructure that was originally in place 7 or certainly comprehensive information 8 regarding the details of the infrastructure 9 that was in place during 2007 and 2008. 10 And I don't know necessarily 11 that the sizing guide encompassed all of the 12 issues that I -- and particularly the use of 13 the telephone wire or what's referred to as 14 "silver satin cable," which was -- would be so 15 far out of compliance with almost any known 16 infrastructure during this time period, that it 17 probably wouldn't -- and I didn't see it in the 18 sizing guide. 19 So I -- I don't have enough 20 information from Hodell to de -- to make that 21 determination of -- of whether Hodell's 22 infrastructure complied in every respect. But 23 we certainly -- I certainly saw areas where it 24 could not have -- could not have complied. 25 BY MR. LAMBERT:</p>

27 (Pages 102 to 105)

1 Q. Would you agree with me that if
2 the items you identified in opinion number
3 seven as not being -- as being antiquated or
4 inadequate, if those items were corrected or
5 addressed at some point, then they were not
6 necessarily the cause of any performance
7 problems Hodell experienced with the software?

8 MR. STAR: Objection to form.

9 A. By "the software," you mean the
10 amalgamated combination of the IFE, Radio
11 Beacon and Business One, or are you referring
12 just to Business One?

13 BY MR. LAMBERT:

14 Q. Sure.

15 MR. STAR: Sure what?

16 BY MR. LAMBERT:

17 Q. The whole solution. The entire
18 solution.

19 A. Okay. Ask -- ask the question
20 again.

21 Q. Would you agree with me, though,
22 that if the items you've addressed here in
23 opinion number seven were, in fact -- assuming
24 that they were actually inadequate or
25 deficient, let's assume that they were

1 addressed by Hodell and that after they were
2 addressed, did not result in any material
3 improvement, you would agree with me that those
4 item weren't the cause of their performance
5 problems, wouldn't you?

6 A. Well, you've asked me to make
7 assumptions that I don't think are necessarily
8 warranted assumptions. I have no idea whether
9 all of the issues that -- that I have noted
10 were adequately addressed.

11 I do know that there were
12 improvements in performance. So that the
13 hypo -- if, hypothetically, all you said was
14 true, then -- which I don't agree that it is --
15 but if hypothetically it were, then -- and if
16 there were no improvement in performance,
17 which, in fact, is contrary to my understanding
18 of what the actual facts are, then under those
19 circum -- those limited circumstances, which I
20 don't agree to, I might agree with you.

21 But the assumptions are not
22 verifiable ones, not assumptions that I would
23 make and are contrary to the evidence that
24 I've -- that I've seen.

25 And -- but even if that were

1 true, that wouldn't necessarily have anything
2 to do with SAP Business One itself, it would
3 have to do, as -- as you asked me, about the
4 combination of Business One with the
5 LSi-supplied add-ons.

6 Q. The basis for your opinion in
7 opinion number seven appears to me to be
8 primarily the deposition transcript of Joe
9 Guagenti and Marcia Weissman; is that correct?

10 A. Well, there are -- there are
11 also some cited and Bates numbered documents.
12 But I've cited a number of things that were
13 from those two depositions, yes.

14 Q. Okay. Can you turn to Page 36,
15 opinion number eight.

16 Are there any assumptions that
17 you've made in the course of rendering opinion
18 number eight?

19 A. I don't believe so.

20 Q. No assumptions? And the basis
21 for opinion number eight is set forth on
22 Pages 36 and 37?

23 A. Yes.

24 Q. You make the statement in the
25 first paragraph on Page 36 that SAP "responded

1 in a manner that, for the most part, far
2 exceeded the standard of care."

3 A. Yes.

4 Q. "For the most part," is that a
5 qualifier? Does that mean in some instances,
6 you think that SAP did not respond in a manner
7 that was with the standard of care?

8 MR. STAR: Objection to form.

9 A. Well, I think it responded in a
10 manner which complied with the standard of
11 care. And for the most part, it exceeded it.

12 But I wouldn't -- and I didn't
13 find any instances where it failed to comply
14 with the normal standard of care.

15 I wouldn't necessarily say that
16 it necessarily exceeded that standard of care
17 in every aspect. But it certainly complied
18 with it in every aspect and exceeded it in
19 many.

20 BY MR. LAMBERT:

21 Q. Can you articulate for me what
22 the standard of care is?

23 A. Well, the standard of care is
24 supporting the customer, as stated in the -- in
25 the license and/or support agreements,

<p style="text-align: right;">Page 110</p> <p>1 providing a level of responsiveness in doing so 2 commensurate with the needs of the customer. 3 Being willing to -- well, I think being willing 4 to go the -- the extra mile and doing support 5 even when that support was, although 6 contractually required to have been paid for, 7 was not paid for. 8 I mean, doing what SAP did had 9 it been paid, as contractually agreed, would 10 have been -- would have met the standard of 11 care. Everything that -- that SAP did would 12 have been consistent with what professional 13 software companies do. 14 Doing so when it wasn't being 15 paid for and then going the extra mile and 16 attempting to resolve problems with add-ons, to 17 the extent that they were allowed to have 18 access to them, would be going beyond the 19 standard of care. 20 Q. I want to ask you a couple of 21 questions about your opinion number two on 22 Page 18. 23 A. Certainly. Let me turn back to 24 that. 25 Okay.</p>	<p style="text-align: right;">Page 112</p> <p>1 I was trying to address with this sentence. 2 Q. You make the statement, "both 3 companies had to have been familiar with 4 software licensing." 5 Can you tell me what that's 6 based on? 7 A. Let me look in context. Where 8 is that on the first page? I know I said that, 9 but . . . 10 Q. It's the second sentence of that 11 first paragraph under opinion number two. 12 A. Oh, yes. There is undisputed 13 testimony that Hodell had licensed FACTS from 14 IBiS, which became part of -- of LSi. 15 And as I stated to you earlier, 16 I'm familiar with the way FACTS -- the way 17 FACTS is sold and the licensing of FACTS. And, 18 also, there's testimony that pre -- prior to 19 that, it had licensed another product, I 20 believe a MicroData product, which is also a 21 product that I have some familiarity with. 22 So it's based on the fact that 23 LSi wasn't -- was a business partner for FACTS 24 and had been involved with the licensing of 25 FACTS to Hodell and that Hodell had, in fact,</p>
<p style="text-align: right;">Page 111</p> <p>1 Q. The first -- the first sentence 2 of that opinion states -- I'm going to 3 summarize it for you, but you can read the 4 whole thing if you want -- that it's the normal 5 custom and practice for a license agreement to 6 be signed before any final commitment to 7 acquire the license to use it. 8 Is that accurate? 9 A. I don't have any problem with 10 your characterization so far. 11 Q. Is it your opinion that Hodell 12 actually did not sign a license agreement 13 before making its final commitment to acquire 14 Business One? 15 A. There has been testimony from 16 Hodell that it considered that it had made a 17 commitment to Business One prior to 18 December 2005. I don't believe it did make a 19 commitment to acquire Business One until it 20 signed the license agreement in December of 21 2005. 22 But there are statements in 23 depositions by Hodell-Natco employees to the 24 effect that they felt they had made such a 25 commitment prior to that date. And that's what</p>	<p style="text-align: right;">Page 113</p> <p>1 licensed FACTS and had licensed the -- I 2 believe it's the MicroData product before that. 3 Q. Okay. Based upon -- I'm going 4 to try to just address your opinion with 5 respect to Hodell's conduct here. I understand 6 you have an opinion with respect to LSi's 7 conduct as well. 8 But with respect to Hodell, your 9 opinion is based upon its -- its licensing of 10 these two prior software products? 11 A. Yes, primarily. I -- yes. 12 Q. I'm sorry, I didn't hear the 13 last part. 14 A. I said primarily. But I 15 guess -- I can't think of anything else. It -- 16 it would be based on its licensing of those two 17 products. 18 Q. You make the statement at the 19 bottom of Page 18, "SAP was totally unaware of 20 any significant details about Hodell or its 21 business needs until some significant time 22 after the license agreement was signed"? 23 A. I do. 24 Q. You don't cite anything in 25 support of that.</p>

29 (Pages 110 to 113)

<p style="text-align: right;">Page 114</p> <p>1 Can you tell me what the basis 2 for that position is? 3 A. Well, I think I expounded on 4 that a little later and I talked about when SAP 5 became aware of the details. And I documented 6 the specific communications that I was aware of 7 where SAP started to become aware of the 8 specific details of -- of Hodell and its 9 business needs. 10 I didn't -- since I went into 11 greater depth on that later, I didn't footnote 12 it here. 13 Q. There's a series of bullet 14 points on the second -- on Page 19. 15 A. Yes. 16 Q. You make the statement in the 17 third bullet point about Hodell contracting 18 previously with LSi and was dissatisfied? 19 A. Yes. 20 Q. What's that in reference to? 21 A. Well, I've -- in part, that's 22 explained in footnotes 18 and 19. But -- and I 23 don't think I noted there, and I probably 24 should also -- oh, well, no, I did note 25 Mr. Reidl's deposition transcript.</p>	<p style="text-align: right;">Page 116</p> <p>1 you asked me for a detail, and I've said 2 there's -- there's more extensive deposition 3 testimony than just what I've cited. You asked 4 me something about things like that before. 5 Q. You make the statement in the 6 fourth bullet point -- I'm not going to read 7 the whole thing. But what's your basis for 8 your conclusion in that fourth bullet point 9 starting with, "Hodell failed to provide LSi"? 10 A. Well, Ms. Weissman testified 11 about that, and she was the -- the LSi project 12 manager, in some detail. 13 I did say, see, for example, 14 Weissman deposition transcript. And I gave two 15 places in her transcript. But I believe there 16 were other LSi -- other testimony of LSi 17 personnel about that as -- as well. 18 Q. Can you tell me, did you review 19 all the deposition transcripts in this case or 20 just selected ones? 21 I'll represent to you that it's 22 not listed in here. 23 A. I think I reviewed all of the 24 ones that were available as of August 10th. I 25 may have reviewed some in greater depth than</p>
<p style="text-align: right;">Page 115</p> <p>1 Mr. Van Leeuwen and Mr. Reidl 2 both testified about Hodell's contracting with 3 IBiS to add the In -- the IFE capability to the 4 FACTS software and the dissatisfaction that 5 Hodell had with Mr. Van Leeuwen's and IBiS's -- 6 and I was including IBiS as part of LSi, as you 7 asked me to at the beginning of this 8 deposition. So I was referring to that 9 dissatisfaction that Hodell had with the LSi 10 attempts to develop the IFE capability for 11 FACTS. 12 Q. Okay. It's your understanding 13 that Hodell had encountered -- was dissatisfied 14 with its FACTS IFE solution? 15 A. Yeah. And, actually -- yes. 16 And, actually, Mr. Reidl had more extensive 17 testimony on this -- on this point than just 18 what I've cited there, where he talked about 19 how he felt that LSi owed him something from 20 the -- the failed or unsatisfactory attempt to 21 develop the capability for FACTS and that he 22 expected concessions on that development from 23 LSi in their -- in their doing the development 24 for the add-on to Business One. 25 So there's an example of where</p>	<p style="text-align: right;">Page 117</p> <p>1 others. But I believe as of August 10th, I had 2 reviewed, and in some cases read and in other 3 cases searched on keywords, all of the 4 depositions that had been done up to 5 August 10th of this year. 6 Q. Your testimony that Hodell 7 didn't provide LSi with crucial data about what 8 it would need is based upon primarily 9 Ms. Weissman's deposition? 10 A. Well, I believe Mr. Van Leeuwen 11 also was very vague on what he had been told 12 and what he was aware. And he certainly didn't 13 contradict Ms. Weissman. 14 And as I say, I did say that was 15 exemplary. So Van Leeuwen's deposition 16 would -- would concur with that. And I believe 17 there was -- I can't recall which ones, but I 18 believe there was other testimony to that 19 effect. 20 I thought Ms. Weissman's was the 21 most explanatory. 22 Q. Okay. Turn to Page 21. 23 A. I'm there. 24 Q. Well, first of all, it starts on 25 Page 20. There's a lead-up. "Hodell failed to</p>

30 (Pages 114 to 117)

<p style="text-align: right;">Page 118</p> <p>1 disclose and LSi failed to appropriately 2 investigate several factors." Then you bullet 3 point them out on Page 21? 4 A. Yes. 5 Q. What's the -- I don't see that 6 you cite any support for those statements. 7 Do you know what that's based 8 on? 9 A. Yes. These are factors that 10 I've cited previously as either known to LS -- 11 LSi, such as the previous attempt to -- to do 12 the In-Flight extensions for FACTS, or unknown 13 to LSi, such as the things that Ms. Weissman 14 noted in her deposition and saying that -- that 15 there is no documentation to support that any 16 of this was communicated -- these factors are 17 specifically with regard to what SAP knew. And 18 you can't cite what isn't there. 19 But I found no documentation or 20 testimony of any kind indicating that any of 21 this had been communicated to SAP. 22 Q. Okay. So this is what -- when 23 you say Hodell failed to disclose, you're 24 saying they failed to disclose these bullet 25 points to SAP?</p>	<p style="text-align: right;">Page 120</p> <p>1 Q. The footnote -- 2 A. Twenty-eight. 3 Q. -- 28 documents? 4 A. Yes. 5 Q. It's not your understanding that 6 Hodell was initially going to be licensing 7 80 users? 8 A. Pardon me? 9 Q. It's not your understanding that 10 Hodell's initial purchase was going to be 80 11 users? It's your understanding it was just 12 going to be 40? 13 MR. STAR: Objection to form. 14 A. Well, I believe there was some 15 communication that there would be an initial 16 license of 40 and then later an additional 40. 17 So -- and this was, I believe, a sales forecast 18 or something, if I recall correctly. But the 19 documents that I saw, which were the specific 20 communications from LSi to SAP, only -- 21 indicated only that the initial license would 22 be 40 and that there would be later growth 23 to 80. 24 BY MR. LAMBERT: 25 Q. Okay. If you turn to Page 22 of</p>
<p style="text-align: right;">Page 119</p> <p>1 A. Yes. Let me -- let me read the 2 whole paragraph. I believe that's -- that's 3 what I meant to say in the paragraph. But let 4 me read the whole paragraph. 5 (Pause) 6 Yes. Perhaps I didn't express 7 it as clearly as I could have. But these are 8 issues that -- that were not -- either weren't 9 investigated adequately by LSi and, therefore, 10 were not disclosed to SAP or were -- just may 11 have been known to LSi, but were not disclosed 12 to SAP. 13 Q. Okay. And then the last thing I 14 want to ask you about this particular opinion 15 is, there's a statement down at the bottom of 16 Page 21 where you state that the only specific 17 SAP knew at the time the license agreement was 18 signed was that Hodell was in the fastener 19 industry and potentially would commit to 20 licensing a 40-user system with growth to 80 21 users? 22 A. Yes. 23 Q. What's that -- what's that based 24 upon? 25 A. The items noted in my footnote.</p>	<p style="text-align: right;">Page 121</p> <p>1 your report, I'm going to ask you a couple 2 questions about opinion three. 3 A. Okay. 4 Q. Down at the bottom of Page 22, 5 you talk about some characteristics that can 6 affect performance? 7 A. Yes. 8 Q. And you use the term, "adequate 9 responsiveness." And I want to get an 10 understanding of what you mean by "adequate 11 responsiveness." 12 A. Every application is different. 13 Some applications require essentially immediate 14 responsiveness. 15 If, for instance, you have an 16 application that controls a heart monitor in a 17 hospital, adequate responsiveness is immediate. 18 Anything less than immediate is unsatisfactory. 19 If you have applications that 20 include providing monthly reports, taking two 21 or three days to produce that monthly report is 22 certainly adequate responsiveness for that 23 particular -- for that particular need. 24 What's adequate for any given 25 application or any given customer is a</p>

31 (Pages 118 to 121)

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1 definition that the customer has to make
2 themselves.

3 Q. For Business One, do you have an
4 opinion as to what adequate responsiveness is
5 for the Business One program?

6 A. We're talking Business One here
7 without -- just in general, without the LSi
8 add-ons?

9 Q. Let's do it -- let's -- I guess
10 let's do it two-fold. Let's do it first
11 without add-ons.

12 What would be adequate
13 responsiveness?

14 A. It would really depend on the
15 usage. And you have to -- adequate
16 responsiveness varies from application to
17 application. Adequate responsiveness for
18 entering a 200-line item order is different
19 than adequate responsiveness for entering a
20 two-line item order. Adequate responsiveness
21 for producing an end-of-month report is
22 different than adequate responsiveness for
23 doing an ad hoc query.

24 I can't really answer your
25 question. And I guess it would probably be the

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1 same for with or without the, yeah, In-Flight
2 extensions.

3 The adequate responsiveness
4 really depends on what portion of Business One
5 or the combination of Business One, the
6 extensions you're talking about, and what the
7 particular requirements of the user are.

8 But whatever that adequate is,
9 the ability of any system, with or without
10 add-ons to meet it, is dependent on the factors
11 that -- that I -- that I cite.

12 Q. Have you ever heard of the
13 concept that the system should be waiting on
14 the user, the user shouldn't be waiting on the
15 system?

16 A. I -- I've -- I'm not sure
17 whether I've ever heard of it. I wouldn't
18 necessarily agree with it in all -- in all
19 circumstances.

20 That's certainly not, in my
21 experience, the -- the standard to which I, as
22 a consultant to a user, would necessarily hold
23 a system that I was considering recommending to
24 that user.

25 Q. What about one to two minutes to

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1 process a transaction, is that adequate
2 responsiveness?

3 A. If you're talking about a
4 400-line item order, it might well be adequate
5 responsiveness. If you're talking about a
6 three-line item order, probably not.

7 Q. Okay. In the process of
8 rendering opinion number three, I think you've
9 stated that you didn't speak with anyone
10 employed by SAP to prepare that opinion?

11 A. I don't recall having done so.

12 Q. Did you consult with or speak
13 with anyone else in the course of rendering
14 opinion number three?

15 A. No.

16 Q. You make the statement on
17 Page 23, that first paragraph, that
18 "theoretical factors are not as reliable as
19 actual measured results."

20 Do you see that --

21 A. Yes.

22 Q. -- particular statement?

23 What are you talking about with
24 respect to adequate measured results -- or
25 "actual measured results"? I'm sorry.

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1 A. Well, I'm making a general
2 statement. And I think the words speak for
3 themselves.

4 It seems to me that --

5 Q. Are you talking about --

6 A. It seems to me that Mr. Gumbel
7 relied to a great extent in his expert report
8 on theoretical factors. And I'm making a
9 general statement that that's not as reliable,
10 in my experience, as what actually happens.
11 And I'm just stating that generally.

12 Q. Okay. And then with respect to
13 this case in particular, though, are you saying
14 that the information that Mr. Gumbel did not
15 consider that is more reliable are -- is the
16 information contained in these three bullet
17 points?

18 A. Well, in general, the infor --
19 the observations and measurements by
20 Mr. Barnea, Mr. Neveux and Mr. Woodrum, these
21 bullet points are some of the specifics where
22 they describe those observations. They also
23 talked about them in their -- in their
24 depositions. But, in general, I'm relying on
25 the observations of those three individuals.

32 (Pages 122 to 125)

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1 Q. Okay. And those are the actual
2 measured results you're referring to up above?

3 A. I wouldn't call those actual
4 measured results either, but I would call them
5 actual observations.

6 Q. Okay.

7 A. And documented --

8 Q. Are there any others?

9 A. -- documented contemporaneous
10 observations.

11 There was nothing produced by
12 any party -- and Hodell would be the party that
13 would have the ability to do so. So there was
14 nothing produced by Hodell that contradicted
15 the observations of -- of these three
16 individuals.

17 And there's nothing that you
18 could rely on about the performance,
19 particularly the performance specifically of
20 Business One, without the -- the LSi add-ons.

21 There's really no evidence, no
22 hard evidence, that I could rely on or that Mr.
23 Gumbel could rely on. But the observations
24 that were there would contradict Mr. Gumbel's
25 judgment.

1 didn't.

2 My -- my opinion was, there's no
3 support for what Mr. Gumbel said. I'm not
4 trying to take a contrary -- make a contrary
5 opinion to his. I'm just saying that -- that
6 there's no support for what he said. And, in
7 fact, what I see --

8 Q. Is it fair to summarize that in
9 your --

10 A. What I see contradicts it.

11 Q. Okay. Is it fair that you're
12 not prepared to testify at trial that you're
13 certain Business One could have scaled to a
14 size -- to a business the size of Hodell.
15 You're just saying that there's no support for
16 Mr. Gumbel's position that it cannot?

17 A. Given the complexity of this
18 case and the -- and the combination of the
19 Business One software with the add-ons, there's
20 no way that I, or I believe anyone, could make
21 any guarantee of what level of scalability
22 the -- the system has.

23 The -- I did mention to you
24 earlier about the additional evidence that came
25 up during Mr. Killingsworth's deposition that I

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1 Q. Okay. My question is, other
2 than these three individuals' observations, and
3 there's a reference to the sizing guide, so
4 other than those three observations and your
5 reference to the sizing guide, are there any
6 other observations or measured results that
7 you're relying upon to state that Mr. Gumbel's
8 position is not correct?

9 A. Well, I'm relying on the fact
10 that he -- I'm basically saying that he had no
11 evidence at all that he relied on.

12 Q. Okay.

13 A. And I'm provide --

14 Q. I get that.

15 A. Yeah. I'm providing --
16 unfortunately, Hodell -- neither Hodell nor LSi
17 provided any evi -- any significant evidence
18 here. And it was certainly within Hodell's
19 ability and power to provide such evidence.

20 And so without the evidence, all
21 I -- all I have is the sizing guide test and
22 the -- the observations. And those --
23 particularly with the observations, they're
24 certainly limited, because in some cases they
25 included the IFE add-ons, in some cases they

1 didn't cite here, which would also add to what
2 I did cite here, and that I would have -- would
3 have included.

4 But even with that, given the
5 combination of -- of all of the -- the Business
6 One software with add-ons, there's no way that
7 I would attempt to testify that that
8 combination would -- would scale up to what
9 Hodell's expectations might be.

10 Q. Mr. Gumbel's opinion, though,
11 correct me if I am wrong, but was that Business
12 One itself, keeping everything else over here,
13 that Business One itself would -- performance
14 would degrade and would not be successful with
15 a business the size of Hodell.

16 Do you have an opinion on that?

17 A. Yes. My opinion is that
18 that's -- that that's wrong and as -- as
19 indicated by the items I've cited and as
20 indicated by the items that came up during
21 Mr. Killingsworth's deposition.

22 Q. So it's your opinion that
23 Business One by itself is capable of scaling up
24 to -- and I'm not talking about the version of
25 Business One that is coming out or is available

33 (Pages 126 to 129)

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1 or will be available at some point in the
2 future. I'm talking about the Business One
3 software that Hodell purchased and implemented
4 and went live on.

5 Is it your testimony that that
6 Business One software was capable of scaling up
7 to a business the size of Hodell?

8 A. Well, it was certainly in use in
9 businesses larger than Hodell as Business One
10 by itself.

11 I don't think the qual -- I
12 disagree with the qualification that you've
13 added in that the size that Hodell was looking
14 to grow to was over a ten-year time frame. And
15 it is normal for Business One customers or
16 customers of any ERP software to upgrade the
17 versions that they have over the -- over a
18 ten-year time frame. In fact, it would be
19 extremely unusual for customers of ERP software
20 not to upgrade software over a ten-year period.

21 So I think excluding the
22 capabilities that were deliverable during the
23 course of that ten-year period as upgrades to
24 the version that Hodell licensed, that's not a
25 valid exclusion.

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1 Q. Well, should Hodell -- I want
2 you to assume that Hodell told SAP that it
3 intended to scale up to 300 users.

4 Should SAP have told Hodell that
5 the version they were buying could not scale
6 that high, but that maybe there would be
7 improvements in the software over the ten-year
8 period that would enable it to?

9 MR. STAR: Objection to form.

10 A. There's no evidence that --
11 that -- of the hypothetical that you've raised,
12 absolutely no evidence of that hypothetical at
13 all.

14 And you want me to speculate on
15 an answer based on a -- a -- an assumption that
16 I don't agree with? Is that what you're
17 asking?

18 BY MR. LAMBERT:

19 Q. I do.

20 A. I think it would be entirely
21 consistent with the customs and practices of
22 the industry. Had this situation which didn't
23 occur, had it occurred, it would be entirely
24 consistent with the custom and practices of the
25 industry for SAP to have said to Hodell this

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1 software is being -- is growing over time and
2 that we expect you will be upgrading it as it
3 grows. And if you are telling us that at some
4 point in the distant future, you expect to have
5 300 or 500 users, and that time frame is over a
6 ten-year -- a ten-year time frame, it's our
7 expectation, but not necessarily our guarantee,
8 that there will be no problem in the Business
9 One software scaling over that time frame.

10 But to speculate -- I don't know
11 that I can really speculate what the --
12 according to the -- to the hypothetical you've
13 given me because it's so contrary to what I
14 understand to be in evidence.

15 Q. Well, maybe we'll just do it as
16 a general hypothetical then.

17 If you're consulting for a
18 client and you're telling a potential vendor
19 that my client is going to go live with ten
20 users, but they expect the -- over the useful
21 life, to go up to a hundred users and the
22 software vendor knows that it cannot scale --
23 the current version does not scale up to a
24 hundred users, but that it might at some point
25 in the future, do you expect that to be

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1 disclosed to your client?

2 MR. LAMBERT: Objection to the
3 form.

4 But go ahead and answer.

5 A. Over what time frame?

6 BY MR. LAMBERT:

7 Q. Before they made the purchase,
8 sir --

9 A. No. They -- they would --

10 Q. -- would you expect them to
11 be --

12 A. They would grow from ten to a
13 hundred over what time frame?

14 Q. What do you consider to be the
15 useful life of an ERP software? I consider it
16 to be seven to ten years.

17 A. We'll take seven to ten years.
18 If -- if -- I think it would be consistent with
19 the customs and practices of the industry, and
20 I would -- as a consultant, I would expect a
21 vendor to either tell me or not tell me if they
22 had developments under way that over that
23 seven- to ten-year time frame would allow the
24 software to scale to that size, I would expect
25 them to -- to respond to me by telling me that

34 (Pages 130 to 133)

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1 they had -- if they were empowered to do so,
 2 that they had such development under way.
 3 And as a consultant, I would --
 4 I would weigh how -- I would weigh their answer
 5 and the specificity they gave that answer to me
 6 in deciding whether that was an adequate
 7 assurance.

8 And it might be --

9 Q. You would agree with me that --

10 A. -- for some clients and it might
 11 not be for others.

12 Q. You would agree with me, though,
 13 that them telling you in the first instance
 14 that the current version would not be
 15 appropriate or scalable to a hundred users
 16 would be material to your decision, correct?

17 MR. STAR: Objection to form.

18 Asks for a legal conclusion.

19 A. If I knew for a fact, which is,
 20 of course, contrary to the facts in this case,
 21 but if I knew for a fact or if the vendor knew
 22 for a fact that scaling to "X" number of users,
 23 whatever that is, was not within the capability
 24 of -- of a software package under any
 25 circumstance, I would expect if that -- if I

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1 had asked that question of that vendor, I would
 2 expect them to give me an honest answer.

3 BY MR. LAMBERT:

4 Q. What if -- what if they were
 5 unsure of whether it could scale to that user
 6 level, but say that you said I'm going to be
 7 purchasing Business One for my client, they are
 8 looking at purchasing Business One for my
 9 client, they are going to need ten users
 10 initially, but they plan to go up to a hundred,
 11 and SA -- would you expect SAP to tell you that
 12 they didn't know whether it could go up to a
 13 hundred users?

14 MR. STAR: Objection to the form
 15 of the question. You've -- are you back
 16 to a specific question about the facts of
 17 this case or are you relying on
 18 hypotheticals? What are we doing here?

19 MR. LAMBERT: This is a
 20 hypothetical.

21 BY MR. LAMBERT:

22 Q. If you were consulting with a
 23 client and you went to SAP and said, I'm
 24 looking at going live with ten users, but over
 25 the useful life I want to go to a hundred

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1 users, would you expect SAP to tell you, I'm
 2 not -- the current version, we don't know
 3 whether that current version could go to a
 4 hundred users?

5 MR. STAR: Objection to form.

6 A. You're asking me to answer a
 7 hypothetical that, to my knowledge, is contrary
 8 to fact.

9 In fact, Business One has scaled
 10 to well over a hundred users. The -- the list
 11 that was produced in Mr. Killingsworth's
 12 deposition shows that it scales to well over
 13 300 or 500 users under certain -- you know, for
 14 various clients.

15 So I -- you're asking for a
 16 hypothetical that's contrary to what I know to
 17 be true.

18 BY MR. LAMBERT:

19 Q. I'm just trying to use numbers
 20 that are simple. I'm not using those as
 21 numbers that have any relation to this case.
 22 I'm trying to just use simple numbers that we
 23 can all understand. That's the only reason I
 24 threw out those numbers.

25 I understand your position that

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1 Business One can scale up to a thousand users,
 2 whatever you think. But I'm trying to just use
 3 a simple hypothetical here for purposes of
 4 finding out what your opinion is. Okay?

5 And that hypothetical is, if you
 6 were approaching SAP on behalf of a client and
 7 asked them or informed them that you were going
 8 to be going live with ten users on Business
 9 One, but that you expect to go up to a hundred
 10 users on Business One over the useful life, if
 11 SAP was unsure or did not know whether it could
 12 scale -- Business One could scale up to a
 13 hundred users, whether SAP should tell you
 14 that. That's the hypothetical.

15 MR. STAR: Objection to form.

16 A. I would expect that the vendor
 17 should be honest with me.

18 BY MR. LAMBERT:

19 Q. And would being honest -- part
 20 of being honest would be informing you that
 21 they did not know whether Business One could
 22 scale up to a hundred users at that time, at
 23 that point in the future?

24 MR. STAR: Objection to form.

25 A. When you start bringing up

35 (Pages 134 to 137)

<p style="text-align: right;">Page 138</p> <p>1 Business One and when you start bringing up 2 numbers of users, the -- you blur the 3 distinction between the hypothetical and the 4 actual facts. 5 What I'm saying is, as a -- as a 6 consultant to buyers and as a buyer, whatever 7 the numbers are and whatever the product is, I 8 would expect the vendor to be honest in 9 answering my questions, answering the questions 10 that I put specifically to that vendor. 11 I wouldn't -- 12 BY MR. LAMBERT: 13 Q. I understand -- 14 A. I wouldn't expect them to be 15 honest in answering a question that I never 16 asked. 17 Q. Well, I want to -- I understand 18 that the vendor should be honest. I think 19 that's something we can all agree on. 20 You don't have an answer to my 21 hypothetical? You don't know what you would 22 expect the vendor to tell you -- 23 MR. STAR: Wait a minute. 24 BY MR. LAMBERT: 25 Q. -- in response to that question?</p>	<p style="text-align: right;">Page 140</p> <p>1 Q. -- that -- you tell them your 2 client is going live with ten users and expects 3 to go up to a hundred over the useful life of 4 the system. Vendor "X" knows that the current 5 soft -- vendor "X" is not sure whether the 6 current version of its software can go up to a 7 hundred users, but thinks it might be able to 8 at some point in the future. 9 Should that information be 10 disclosed to you prior to the purchase? 11 MR. STAR: Objection. I'm not 12 going to let him answer that question. 13 You're trying to ask him for 14 effectively a legal conclusion here. And 15 I don't think that's an appropriate 16 hypothetical, to try to get this witness, 17 who is not a legal expert. 18 I mean, I see what you're trying 19 to do. You're effectively trying to get 20 him to tell you that there is some duty 21 of disclosure where somebody asks some 22 irrelevant question. That's not an 23 appropriate hypothetical. 24 I mean, there are hypotheticals 25 that you can ground in --</p>
<p style="text-align: right;">Page 139</p> <p>1 MR. STAR: Now you're being 2 argumentative. He has answered the 3 question the best way that he can. And 4 that's the answer. 5 MR. LAMBERT: No. He hasn't 6 answered it at all. 7 MR. STAR: Well, your opinion of 8 that is different than mine. And the 9 witness has given you the answer. 10 If you have a different answer, 11 you can elaborate further. 12 A. I have no different answer. 13 When you bring up specific 14 products and specific numbers and specific 15 vendors, you blur the distinction between the 16 hypothetical and the actual. And -- 17 BY MR. LAMBERT: 18 Q. Okay. 19 A. -- the best way I can answer 20 that is the way I have. I have no better 21 answer. 22 Q. So I'll ask it this way: You're 23 shopping vendors for a client and you go ask 24 vendor "X" -- 25 A. Yes.</p>	<p style="text-align: right;">Page 141</p> <p>1 MR. LAMBERT: It absolutely is. 2 MR. STAR: No, I don't agree. I 3 mean, if you want to try to rephrase it, 4 go ahead. I think he's answered your 5 questions, though. 6 But go on. That one's not 7 appropriate. 8 MR. LAMBERT: Yes, it absolutely 9 is appropriate. He's testified that he 10 has consulted with, what, thousands of 11 clients on the purchase and 12 implementation of business software. 13 I'm asking him to render an 14 opinion as to whether he would expect 15 certain information to be disclosed to 16 him as part of that consultation. 17 And he's perfectly capable of 18 answering what his opinion as a 19 testifying expert would be as to what 20 should be told to him in the purchase of 21 ERP software. 22 So -- and that it's a very 23 simple hypothetical. It's not 24 complicated whatsoever. 25 BY MR. LAMBERT:</p>

36 (Pages 138 to 141)

1 Q. The question is, if you're
2 purchasing -- if you're deciding whether to
3 purchase ERP software and the vendor knows that
4 you expect that software to be able to
5 accommodate "X" number of users in the future,
6 and the vendor isn't sure whether it can,
7 whether you, as acting on behalf of the
8 purchaser, would expect that information to be
9 told to you? That's the simple question.

10 MR. STAR: Same objection.

11 You can answer if you
12 understand.

13 A. First of all, I never said
14 thousands of -- of businesses that I've
15 consulted. I've consulted hundreds of
16 businesses. We've evaluated -- and I've
17 evaluated thousands of software packages or
18 certainly on the order of a thousand software
19 packages, just for clarification.

20 And the answer is, you didn't --
21 you have not phrased that as a specific
22 question. And so I'll give you the general
23 answer that my expectation as a consultant is
24 that depending on what the question -- the
25 specific question that I ask is, I would expect

1 the vendor to give me a truthful answer.

2 BY MR. LAMBERT:

3 Q. And if the specific question
4 was, I'm going live with ten users on product
5 "X," and I expect to go up to a hundred users
6 on product "X", will that work for me, and they
7 know that they're not sure it can go up to a
8 hundred, the vendor knows it's not sure that
9 product "X" can go up to a hundred users, would
10 you expect that to be disclosed to you in
11 response to that question?

12 A. I would expect them to say, I'm
13 not in a position to commit. I can't rule out,
14 but I'm not in a -- in a position to commit
15 that the software as it's deliverable today
16 will do a hundred users.

17 However, if you're talking about
18 going to a hundred users seven years from now,
19 it's my expectation, without guarantee, that
20 the software will -- will do that, if that's
21 what the vendor believes to be the truth.

22 Q. Okay. You make the statement at
23 the top of Page 24 about long -- a discussion
24 about long orders.

25 A. At the top of Page 24?

1 MR. STAR: It's "91-line item
2 order."

3 A. (Continuing) Oh, yes.

4 BY MR. LAMBERT:

5 Q. You say that's not something the
6 software company could reasonably anticipate?

7 A. Not as a normal case. I
8 mentioned to you that I've consulted to
9 hundreds of clients on the selection of
10 computer software. Probably distribution
11 companies are the most common type of client
12 that I've -- I've had from 1980 to the present.
13 I've worked with, literally, dozens of
14 companies that do distribution.

15 It is my experience that the
16 average -- that typical orders for distribution
17 companies are five to 25 line items, usually
18 toward the bottom of that range.

19 For a software company to expect
20 average orders to be well above that range is
21 not something that any customer should expect
22 would normally be the case.

23 Q. So your testimony, that Hodell
24 experienced problems with the Business One
25 implementation only with respect to large

1 orders?

2 A. Number one, Hodell experienced
3 problems not just with Business One. I don't
4 know that Hodell ever used Business One without
5 the LSi add-ons to perform its -- any actual
6 business function.

7 There were limited tests of --
8 of the software with the IFE extensions
9 disabled that indicated adequate performance.
10 But it was never -- there was never any
11 production use, to my knowledge, with IFE --
12 with the IFE extensions disabled.

13 So -- and to my knowledge, there
14 was never any compre -- certainly Mr. Gumbel
15 didn't cite and I haven't seen any
16 documentation of any comprehensive measurement
17 of what performance, what responsiveness this
18 amalgam of Business One and -- and In-Flight
19 produced.

20 So I'm not testifying as to what
21 it did or didn't do because there's no
22 evidence. And certainly there's no evidence of
23 what it did or didn't do in a production
24 environment of just Business One.

25 Q. Okay. Can you turn to Page 25.

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1 A. Certainly.
 2 Q. There's a discussion about
 3 two-tier architecture.
 4 A. Okay.
 5 Q. Do you know whether PeopleSoft
 6 is still running two-tier architecture on --
 7 for its system?
 8 A. I would be surprised if they
 9 didn't have some legacy clients that still ran
 10 it. But my understanding is, that's not their
 11 current offering.
 12 Q. They abandoned it, right?
 13 MR. STAR: Objection.
 14 A. Well, they -- just like -- just
 15 like SAP is adding Hanna, every software
 16 company -- PeopleSoft is now part of Oracle.
 17 It's not an independent company.
 18 Every company improves upgrades
 19 and migrates its -- its products. So that's
 20 a -- it's my understanding that any PeopleSoft
 21 customer who had the two-tier version had the
 22 opportunity to upgrade and migrate to the
 23 three-tier version as that became the standard
 24 product.
 25 BY MR. LAMBERT:

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1 Q. What about the SAP R/2 product
 2 you cited?
 3 A. What about it?
 4 Q. Is that still in use?
 5 A. I believe, to the best of my
 6 knowledge, there still are some SAP clients
 7 that still use R/2, yes. But I --
 8 Q. Do you know if they're --
 9 A. But I haven't looked. And the
 10 last time I heard of that was a couple of years
 11 ago. But I would expect -- it wouldn't be
 12 unexpected if there were still R/2 -- R/2
 13 installations in place.
 14 Q. Is SAP R/2 a two-tier
 15 architecture?
 16 A. That's my understanding.
 17 Q. What's that understanding based
 18 on?
 19 A. Oh, I -- if I recall correctly,
 20 I saw that on the SAP website. That's my --
 21 that's my recollection of where I saw it.
 22 Q. Are there differences -- even
 23 within two-tier architecture, are there
 24 differences in the way that information is
 25 processed or can there be?

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1 I guess that's a poor question.
 2 A. Yes.
 3 Q. Two-tier architecture isn't --
 4 A. Yeah, it is a poor question.
 5 Q. All two-tier architecture
 6 products are not the same; is that correct?
 7 MR. STAR: The court reporter
 8 missed that. Can you repeat it?
 9 MR. LAMBERT: Strike it.
 10 BY MR. LAMBERT:
 11 Q. Would you look at footnote 44.
 12 Can you explain what you meant
 13 by your statement there in footnote 44?
 14 A. Yes. What I meant there is that
 15 in Mr. Gumbel's report, he refers to the two
 16 tiers as being the -- the PC on the user's desk
 17 and the application server that supports the
 18 PCs on the users' desks.
 19 In some cases, some systems are
 20 architected with two tiers. But those are not
 21 the two tiers. They could be architected with
 22 what are called dumb terminals. On
 23 application -- which is -- a dumb terminal
 24 wouldn't be a tier. And by "dumb terminal," I
 25 mean a terminal that is not a computer in and

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1 of itself, wouldn't be a tier.
 2 With a -- a central computer and
 3 a database server, that would also be a
 4 two-tier architecture, but not the same
 5 two-tier architecture that Mr. Gumbel
 6 describes.
 7 Q. Well, did Mr. Gumbel, in your
 8 opinion, accurately describe the Business One
 9 two-tier architecture or are you saying there
 10 could be different Business One two-tier
 11 architectures?
 12 A. To the best of my knowledge,
 13 Mr. Gumbel accurately described the Business
 14 One two-tier architecture.
 15 Q. You're saying there's other
 16 products that have two-tier architecture that
 17 aren't necessarily the same as Business One?
 18 A. That's correct. When you have a
 19 two-tier or a multi-tier product, not every
 20 vendor uses the same two or the same three or
 21 four tiers as every other vendor.
 22 Q. Can you turn to Page 27. I'm
 23 going to ask you a quick question about opinion
 24 four.
 25 There's a series of bullet

38 (Pages 146 to 149)

<p style="text-align: right;">Page 150</p> <p>1 points, three bullet points. And above that, 2 you make the statement, "Among those that are 3 likely to have been applicable to the reason 4 why SAP lowered the target size of prospective 5 SAP Business One customers." 6 A. Yes. 7 Q. Do you see that statement? 8 Do you have any supportable 9 basis for making -- or for these three bullet 10 points or are you just rendering a -- taking a 11 guess at it? 12 A. I'm not taking a guess. I don't 13 do guesses. 14 I have footnoted the three 15 bullet points as to the specific documents that 16 I -- that support them, number one. 17 Number two, as a former marketer 18 of computer systems and software products, 19 I'm -- I have personal experience at 20 market-based focus of the product rather than 21 functionality-based focus of the product. 22 Q. You didn't cite any testimony or 23 communication with anyone at SAP in support of 24 those opinions? 25 MR. STAR: Objection to the</p>	<p style="text-align: right;">Page 152</p> <p>1 Q. There's a series of bullet 2 points under opinion number five starting on 3 Page 28, continuing through Page 29. 4 A. Yes. 5 Q. I'm going to ask you a couple 6 questions about -- about a couple of those. 7 The second bullet point on 8 Page 28, what's a fit/gap analysis and why is 9 that relevant to your opinion in number -- 10 opinion number five? 11 A. Fit/gap analysis is a commonly 12 done analysis after -- after generally a 13 contract signing, although sometimes it's done 14 beforehand, to identify all of the areas where 15 a -- an individual software product fits the 16 specified needs of a potential user and all 17 those areas which -- where there are gaps where 18 either workarounds or modifications might be 19 required. 20 Q. Why is your opinion that there 21 was not a fit/gap analysis performed relevant 22 to whether the Business One and In-Flight 23 solution implementation was successful? 24 A. Well, when a fit -- fit/gap 25 analysis is performed, there is customarily a</p>
<p style="text-align: right;">Page 151</p> <p>1 form. Mischaracterizes the report. 2 BY MR. LAMBERT: 3 Q. Is that accurate? 4 MR. STAR: You should read the 5 whole report, the whole section. 6 A. Yes, there are other -- there is 7 ample testimony that I've cited, I believe, 8 leading up to these points and that I've cited 9 in -- I believe in the industry background. 10 And there's testimony by several 11 of the individuals that were deposed that are 12 in support of -- of these points, in addition 13 to the -- the specific documents. 14 If you read the whole support 15 for that opinion, I cite at least exemplary 16 testimony of -- of that nature. 17 BY MR. LAMBERT: 18 Q. Is that Mr. Ziv and Mr. Neveux 19 that you're speaking of? 20 A. Yes. And I believe there's 21 other testimony as well. 22 Q. Have you actually personally 23 spoken with anyone at SAP about any of those -- 24 those three opinions on Page 27? 25 A. Not that I recall.</p>	<p style="text-align: right;">Page 153</p> <p>1 fit/gap report. No such report was produced in 2 this case. 3 Q. You make the statement at the 4 end of opinion number five on Page 30, "Hodell 5 cannot escape responsibility for its decision 6 to license the SAP Business One software in 7 2005, while it still had the opportunity to 8 delay licensing or reverse the decision to go 9 with the proposed system altogether." 10 Do you see that statement? 11 A. Yes. 12 Q. What is that based upon? 13 A. Hodell faced a decision point in 14 December of 2005. It was under -- it may have 15 felt that -- that -- whatever it felt. But the 16 signing of the SAP license agreement was a 17 discrete act. It's one that Mr. Wright will 18 testify that he had serious concerns about, 19 which he did nothing to investigate or 20 alleviate -- nothing substantive to investigate 21 or alleviate. 22 And when a businessperson makes 23 a decision with less than full information that 24 was readily available, it seems to me, as a 25 businessperson, it's hard to escape</p>

39 (Pages 150 to 153)

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responsibility for having done so.

Q. There's a statement at the top of Page 30, "LSi was an experienced implementer of business applications software."

Do you see that statement?

A. Yes.

Q. Do you know how many implementations of Business One LSi had done prior to Hodell?

A. I -- if my recollection is correct, Hodell was one of its first, if not its first.

Q. Is it your testimony that it was Hodell's obligation to test the Business One software prior to going live?

A. To test? Well, it was its obligation not to go live until it was satisfied that it had done everything that it could to confirm that the system -- not just Business One, but the system, including Business One and the extensions -- performed adequately.

Yes, it's always the user's responsibility to -- to determine that the system is acceptable to go live before it does.

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In this case, Hodell went live despite the rec -- Hodell had only one individual on staff, to my knowledge, that had any level of technical competence, and that individual apparently felt that the software was not ready to go live and recommended to Hodell management that it not go live.

And so it certainly -- Hodell's decision to overrule the recommendation of its only employee, its only knowledgeable employee, is certainly its own responsibility.

Q. Is that employee you're referring to, Terry Phillips?

A. Yes.

Q. You think that he was Hodell's what, IT project manager?

A. I believe he was the --

Q. Is that your -- what your testimony is based on?

A. I believe he was the only -- he was the most technically knowledgeable employee of Hodell.

Q. What about people that weren't employees of Hodell? What about LSi? What if it was LSi's -- SAP's business partner's

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recommendation to go live, is it your testimony Hodell should not be allowed to rely upon that advice?

MR. STAR: Objection to form.

You can answer.

A. Businesspeople can rely on whatever they choose to rely on.

What I'm saying is, if they -- they can't escape responsibility for making a decision that was recommended by someone outside the business, when it was their decision to make.

When they make a decision, that recommendation is their decision. It's not -- LSi had no power to make that decision. That was entirely under Hodell's control. It can't then blame someone else for a decision that was entirely its own decision. That's just common business sense.

BY MR. LAMBERT:

Q. Okay. You make a statement that Hodell didn't comply with LSi's testing recommendations on Page 33.

A. Yes.

Q. Is that -- is your basis for

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making that statement solely the deposition testimony of Marcia Weissman?

A. Yeah. I did note that there was contradictory testimony from Mr. Phillips.

But -- so it appeared to me that Ms. Weissman's testimony was more reliable than Mr. Phillips' in that regard. But I did note that there was contradictory testimony.

And even if -- if Mr. Phillips' testimony was -- was the one that was, in fact, the more reliable, Mr. Phillips said that -- that even having done that testing, that the test results were inadequate. And to go live with failed test results would indicate that the testing was not complete or not adequate.

So even if you believe Mr. -- if one were to put more credence in Mr. Phillips' testimony that what he thought was adequate was done, my judgment is, since the result was unsatisfactory, the testing that he felt was adequate was, per se, not adequate. And his own recommendation that Hodell not go live is -- is evidence of that.

Q. Okay. Can you turn to Page 34. This is opinion number seven where we're

40 (Pages 154 to 157)

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1 talking about some of the inadequacies in
 2 Hodell's hardware network?
 3 A. Yes.
 4 Q. I want to talk about the second
 5 bullet point. "Hodell's network was configured
 6 with a single server with a single drive,
 7 instead of splitting the configuration up to
 8 share the load among multiple servers."
 9 A. Yes.
 10 Q. What do you mean by that?
 11 A. I -- I'd have to go back and
 12 I -- I referenced Mr. Guagenti's deposition,
 13 Pages 25 and 26. And I'd have to review what
 14 he said in order to answer that. I don't
 15 recall specifically what he said.
 16 Q. What do you mean by, "splitting
 17 the load up among multiple servers"? Is that
 18 your language or is that Mr. Guagenti's?
 19 A. I can't answer that question
 20 without -- if -- if -- if we have that
 21 deposition here, I'd be happy to look at
 22 specifically what I referenced and give you an
 23 answer. But without looking at what I
 24 referenced in the deposition, I -- I can't give
 25 you an answer.

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1 Q. Well, I'm trying to get, is that
 2 your opinion? Is that bullet point your
 3 opinion, that networks should have been split
 4 up among multiple servers to share the load?
 5 Is that one of your expert opinions in this
 6 case?
 7 A. I say what I say. I stand
 8 behind what I say. I can't explain it any
 9 further without looking.
 10 If you'd like to show me the
 11 deposition where I -- what I referenced there,
 12 I could give you more explanation than I put
 13 here. I can't do it from memory.
 14 Q. Okay.
 15 MR. LAMBERT: Greg, do you want
 16 to take a minute? I think I might be
 17 done.
 18 MR. STAR: Okay.
 19 THE VIDEO TECHNICIAN: Going off
 20 the record at 13:24.
 21 ---
 22 (Whereupon, a recess was taken
 23 from 1:24 p.m. to 1:29 p.m.)
 24 ---
 25 THE VIDEO TECHNICIAN: Back on

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1 the record at 13:29. Beginning of tape
 2 number four.
 3 BY MR. LAMBERT:
 4 Q. Under opinion number seven, are
 5 there any other inadequacies or deficiencies in
 6 Hodell's network or hardware that you can
 7 identify that would have contributed to its
 8 performance issues other than those listed
 9 under opinion seven?
 10 A. I don't believe I -- I don't
 11 believe there were others.
 12 Q. Under opinion eight, you make
 13 the comment that Hodell was no longer providing
 14 top-down commitment?
 15 A. I don't recall where I said
 16 that, but that I do believe, to some extent,
 17 that's true, yes.
 18 Q. What do you mean by that?
 19 A. There was an indication early in
 20 the process that Hodell had already told LSi
 21 and/or some of its employees that it was
 22 considering litigation, and looking for a --
 23 which indicates to me less than a full top-down
 24 commitment.
 25 Q. Okay. So it's your basis that

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1 because -- because Hodell had consulted with
 2 legal counsel, they were no longer providing
 3 commitment to the success of this
 4 implementation? Is that the basis for that
 5 statement?
 6 A. If -- I don't recall the
 7 specific documents and/or testimony that I
 8 looked at at the time. But it was in that
 9 context, there was some discussion of the --
 10 the level of commitment.
 11 It wasn't just the fact of -- of
 12 considering litigation, but that if -- if we
 13 were to look at all the -- the specific
 14 documents and/or -- and testimony I cited and
 15 look in the context there, there was an
 16 indication that there was less than full
 17 top-down commitment.
 18 Q. Can you turn to Page 38. I want
 19 to ask you a couple questions about your prior
 20 testimony.
 21 A. Sure.
 22 Q. In each of these cases cited,
 23 was it a dispute between a software customer
 24 and a software vendor?
 25 A. No.

41 (Pages 158 to 161)

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1 Q. Which ones were not?
 2 A. Pardon me?
 3 Q. Which ones were not a
 4 customer/vendor dispute?
 5 A. The Oracle USA v. Rimini Street
 6 is -- they're two vendors.
 7 The --
 8 Q. Who did you testify on behalf of
 9 in that case?
 10 A. Pardon me?
 11 Q. Who were you representing or
 12 testifying in favor of in that case?
 13 A. I'm engaged by the law firm for
 14 Rimini Street.
 15 Q. Okay.
 16 A. The ePlus v. Lawson, it was a
 17 patent dispute between two vendors. I was
 18 engaged by counsel for ePlus, the plaintiff.
 19 That's -- the others are
 20 disputes between vendors and their customers.
 21 Q. Okay. For each of the remaining
 22 cases where there were -- it was a
 23 vendor/customer dispute, can you tell me for
 24 each one whether you were on the side of the
 25 vendor or the customer?

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1 A. Certainly. The PC Onsite versus
 2 Massage EN V, I was on the side of the
 3 customer.
 4 The Prodomax versus Encompix, I
 5 was on the side of the customer, Prodomax.
 6 In the Massage EN V case,
 7 Massage EN V was the -- was the -- well, the
 8 Massage EN, but their trade name is
 9 Massage EN V.
 10 Prodomax was the customer and I
 11 was engaged by their law firm.
 12 In the DCS and FDCS cases, I was
 13 engaged by three different law firms, all
 14 representing different dealerships or groups of
 15 dealerships. And DCS, or also known as FDCS,
 16 was the vendor.
 17 The Axway versus DHL Express, I
 18 was on the side of DHL Express, which was the
 19 customer.
 20 AOL versus Accenture, I was
 21 engaged by counsel for AOL, which was the
 22 customer.
 23 And Summit Electric versus IBM,
 24 I was engaged by counsel for Summit Electric,
 25 which was the customer.

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1 Q. My last question is, hopefully,
 2 at the bottom of Page 37, your conclusion for
 3 your last opinion eight, you state that
 4 ultimately -- you make the conclusion that,
 5 ultimately, significant performance
 6 improvements were achieved.
 7 Do you see that?
 8 A. Yes.
 9 Q. And you cite to a -- an SAP
 10 document?
 11 A. Yes.
 12 Q. Is there anything else you're
 13 basing that conclusion upon?
 14 A. You know, I'd have to look at
 15 that document to -- to let you know whether
 16 I -- well, I say, for example, e.g., that
 17 document. I believe there were other documents
 18 that said essentially the same thing.
 19 Q. Can you recall any of them right
 20 now?
 21 A. Not off the top of my head, no.
 22 MR. LAMBERT: Okay. All right.
 23 Thank you, sir.
 24 THE WITNESS: You're welcome.
 25 MR. HULME: I can move the

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1 camera, but --
 2 MR. STAR: We can see you, Roy.
 3 MR. HULME: You can see me?
 4 MR. STAR: We have the distinct
 5 pleasure --
 6 MR. HULME: All right.
 7 MR. STAR: -- yes.
 8 ---
 9 EXAMINATION
 10 ---
 11 BY MR. HULME:
 12 Q. Let me start by asking you,
 13 would you agree that collaboration between a
 14 manufacturer and a manufacturer's
 15 representative or the reseller is something
 16 that a manufacturer should promote?
 17 A. In -- in -- in general, I think
 18 it's good that -- that -- by "manufacturer," I
 19 think you mean a software developer?
 20 Q. Yes.
 21 A. Yeah, in general, I think it's
 22 good that -- that software developers promote
 23 communication between themselves and their
 24 implementers, business partner implementers.
 25 Q. If you want a good working

42 (Pages 162 to 165)

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1 relationship, that's an important thing that
2 the software developer should be doing,
3 correct?

4 A. I -- I don't --

5 MR. STAR: Objection to form.

6 A. (Continuing) I don't advise
7 business partners or software developers. I
8 think it's a good thing to do. I think it
9 works to everyone's benefit.

10 BY MR. HULME:

11 Q. It works to the customer's
12 benefit if the partner of the software
13 developer is kept up-to-date as to what the
14 program can and cannot do, correct?

15 A. Yes.

16 Q. It works to the benefit of both
17 the manufacturer, the representative and the
18 customer?

19 A. The developer, the implementer
20 and the customer, yes.

21 Q. Now, what's your understanding
22 of the target market for Business One in 2004
23 and 2005?

24 A. It was what was referred to as
25 the SMB market, small-medium-sized business.

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1 Q. And the small- to medium-sized
2 business, you defined that.

3 A. Well, SAP is a European
4 country -- company. And there's actually a
5 European economic community definition of what
6 an SMB is.

7 And I think that that definition
8 coincides with -- with -- with the target
9 market for this product not only in Europe, but
10 also in the U.S.

11 Q. Can we agree that Hodell fits
12 squarely within the target market as you just
13 defined?

14 A. That's my understanding, yes.

15 Q. Okay. So based upon your
16 understanding of what SAP's target market was,
17 can we agree that SAP fits squarely within the
18 market that SAP was marketing as Business One
19 to?

20 MR. STAR: I think you
21 misstated, Roy. I think you said SAP
22 instead of Hodell.

23 MR. HULME: Okay. Let's start
24 again.

25 MR. STAR: Yes.

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1 BY MR. HULME:

2 Q. Can we agree that Hodell fits
3 squarely within the market to which SAP was
4 targeting Business One?

5 MR. STAR: Objection to form.

6 A. Certainly in terms of annual
7 revenue and number of employees, they -- they
8 fit in -- in the target market, yes.

9 BY MR. HULME:

10 Q. And those are the only two
11 criteria used to define the small- to mid-sized
12 businesses, as far as you know?

13 A. I think I put it in here.
14 According to the EC, the size range for SMEs,
15 small- and medium-sized enterprises, is from
16 ten to 250 employees and from two million Euros
17 to 50 million Euros, which would be
18 two-and-a-half million to 65 or \$75 million in
19 annual revenues, depending on the exchange
20 rate.

21 And -- and it's my understanding
22 that Hodell did fit into that -- into that
23 range.

24 Q. Do you agree that there were
25 inherent limitations in Business One in 2006

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1 that made it inappropriate for Hodell?

2 A. No.

3 Q. And why not?

4 A. I've seen no evidence that there
5 was. And I've seen -- and there has been
6 evidence produced in this case that other
7 businesses of comparable size and complexity to
8 Hodell were successfully using Business One.

9 Now, if you mean by "inherent
10 limitations," did it meet every single one of
11 hotel -- Hodell's requirements, certainly we --
12 we know that it -- that at least in the
13 perception of LSi and in the perception of
14 Hodell, it required these IFE add-on
15 modifications to be made in order to meet -- to
16 be made successfully in order to meet Hodell's
17 needs.

18 But if your question is was it
19 suitable for a company the size and complexity
20 that hotel -- Hodell is, the answer is yes.

21 If your question is, did it meet
22 of all of Hodell's known needs, the answer is,
23 apparently, no.

24 Q. Have you seen the opinion of Udi
25 Ziv, for example, who expressed an opinion that

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<p style="text-align: right;">Page 170</p> <p>1 a company the size of Hodell was an 2 inappropriate company to use Business One at? 3 MR. STAR: Objection to form. 4 BY MR. HULME: 5 Q. Have you seen that? 6 MR. STAR: Objection to form. 7 He should see the document. Do 8 you have it? Do you want to refer him to 9 a document? 10 BY MR. HULME: 11 Q. I'm just asking, have you seen a 12 document from Udi Ziv where he expressed 13 opinion that no sane person would sell Business 14 One to a company the size of Hodell? 15 MR. STAR: Objection to form. 16 A. I saw -- I can't, from memory, 17 attest to the exact wording, Mr. Ziv's exact 18 wording. 19 I -- I recall that there was an 20 off-the-cuff e-mail that expressed something of 21 that nature that Mr. Ziv later made statements 22 that were contrary to that. 23 I also know that the product was 24 outside the -- the target market, as I've 25 discussed, or the sweet spot, the marketing</p>	<p style="text-align: right;">Page 172</p> <p>1 necessarily that it would be accurate to 2 characterize him as part of, quote, the 3 development group. 4 BY MR. HULME: 5 Q. Well, do you understand that he 6 was head of the development group, reporting 7 only to the board of directors? Do you 8 understand that or not? 9 A. It was my -- 10 Q. Do you understand that or not? 11 A. Pardon me? I didn't mean to 12 interrupt. Could you repeat the last part of 13 your question? 14 Q. Okay. I just wanted to know if 15 you -- if that was your understanding. 16 A. It was my understanding that he 17 headed up the Israeli division or the -- the 18 portion of SAP that had responsibility for the 19 Israeli division where Business One was 20 originally developed. 21 To characterize him as head of 22 the development group, I think, is an 23 inaccurate characterization. 24 Q. Okay. But you do recall that he 25 made statements clearly indicating his opinion</p>
<p style="text-align: right;">Page 171</p> <p>1 objective for Business One. 2 And it wasn't clear, to the best 3 of my recollection, from the e-mail that -- and 4 I'd have to see it -- that you referred to 5 whether he was talking about Business One 6 itself or whether he was talking about the 7 marketing -- target market for Business One. 8 BY MR. HULME: 9 Q. Do you understand that Mr. Ziv 10 is in the development group? 11 MR. STAR: Objection to form. 12 A. I understand that Mr. Ziv was 13 based in Israel, where the software was 14 developed. He was not originally with the same 15 company that developed the software, although 16 both his company and the company that 17 originally developed the software were both 18 acquired by SAP. 19 In terms of being in the 20 development group, it wasn't clear to me 21 whether his responsibilities were primarily -- 22 primarily development or primarily management, 23 but I think the latter. 24 So it is my understanding that 25 he was in the Israeli part of SAP, but not</p>	<p style="text-align: right;">Page 173</p> <p>1 that Business One was inappropriate for a 2 company of Hodell's size, correct? 3 MR. STAR: Objection to form. 4 A. I don't think that's an 5 accurate -- to my recollection, I don't believe 6 that's an accurate characterization of what his 7 e-mails indicated. 8 I think they indicated an 9 initial reaction, not a fully formed opinion. 10 So to characterize it as his opinion doesn't 11 seem accurate to me. 12 And it was also -- doesn't seem 13 accurate to me to -- to imply from that, that 14 that was a development or a functionality or a 15 capability perspective rather than a marketing 16 perspective. 17 BY MR. HULME: 18 Q. Okay. And where does marketing 19 differ from development when it relates to 20 representing whether a program is appropriate 21 for a particular customer? 22 MR. STAR: Objection to form. 23 A. Companies also -- often have 24 overlapping product lines. And they make 25 arbitrary decisions for marketing purposes</p>

44 (Pages 170 to 173)

<p style="text-align: right;">Page 174</p> <p>1 about how these products with overlapping 2 capabilities, to whom they should be marketed, 3 that have, in some cases, little or nothing -- 4 not in all cases, but certainly in some cases, 5 little or nothing to do specifically with the 6 functionality, capability or capacity of the 7 products. 8 BY MR. HULME: 9 Q. So -- but you would agree with 10 me that from Mr. Ziv's perspective, whatever 11 he -- whatever his role was within the company, 12 his initial impression was that this was an 13 inappropriate application of Business One, 14 correct? 15 MR. STAR: Objection to form. 16 A. His -- 17 BY MR. HULME: 18 Q. That was his original statement. 19 A. His -- 20 MR. STAR: Objection to form. 21 Assume facts not in evidence. 22 A. (Continuing) His e-mail says 23 what it says. Let's look at the e-mail. And I 24 think the e-mail speaks for itself. 25 But it has to be taken in the</p>	<p style="text-align: right;">Page 176</p> <p>1 reflected in his initial e-mail. 2 Q. His initial e-mail suggested 3 that the money be refunded to the customer, 4 correct? 5 MR. STAR: Objection to form. 6 A. I -- I -- I don't recall the 7 wording. It says what it says. I don't 8 dispute that it says what it says. 9 BY MR. HULME: 10 Q. And do you recall that his 11 solution initially was to refund the customer's 12 money? 13 MR. STAR: Objection to form. 14 BY MR. HULME: 15 Q. Do you have that recollection? 16 A. I don't recall one way or the 17 other. 18 Q. Okay. If that was his initial 19 solution, would you agree with me that more 20 likely than not, he was looking at this from a 21 functional standpoint, a development 22 standpoint, not a marketing standpoint? 23 MR. STAR: Objection to form. 24 It calls for speculation. 25 THE WITNESS: Should I answer?</p>
<p style="text-align: right;">Page 175</p> <p>1 context of what his more refined or seasoned 2 statements were once he had investigated things 3 further. 4 BY MR. HULME: 5 Q. You mean the statement -- his 6 follow up e-mail to Dan Lowery, the 7 contradictory e-mail. Is that what you're 8 referring to? 9 MR. STAR: Objection to form. 10 A. Show me the e-mail. 11 BY MR. HULME: 12 Q. Okay. You said that you had a 13 recollection that he made some contradictory 14 statements after he made his original 15 off-the-cuff remark. You testified to that. 16 Do you have a recollection of 17 what communications you were referring to? 18 A. To the best of my recollection, 19 he had some involvement and there was e-mail 20 traffic involving him following that initial 21 reaction he had. 22 My recollection, he was also 23 deposed and made statements in his deposition 24 that reflect a more thorough analysis of -- of 25 what the situation actually was than would be</p>	<p style="text-align: right;">Page 177</p> <p>1 MR. STAR: I can't instruct you 2 not to answer because it doesn't call for 3 privileged information. But if you feel 4 that you're qualified to render an 5 opinion as to what was -- 6 MR. HULME: That's all you have 7 to say, Greg. 8 MR. STAR: -- called for, then 9 go ahead. 10 MR. HULME: Greg. 11 A. I -- I -- repeat the question, 12 please. Or maybe could I have the court 13 reporter read back the question? 14 MR. HULME: Sure. 15 --- 16 (Whereupon, the court reporter 17 read back the following: 18 "QUESTION: If that was his 19 initial solution, would you agree with me 20 that more likely than not, he was looking 21 at this from a functional standpoint, a 22 development standpoint, not a marketing 23 standpoint?") 24 --- 25 A. (Continuing) No.</p>

45 (Pages 174 to 177)

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1 BY MR. HULME:

2 Q. And why not?

3 A. There's no evidence to indicate
4 that. And it was a -- I don't believe
5 necessarily that his deposition testimony
6 supported that.

7 Q. What occurred -- do you know of
8 anything that occurred between the time he
9 wrote his initial e-mail in 2007 and his
10 deposition in 2012?

11 Do you have any knowledge of
12 what occurred in that interim that may have
13 changed his mind?

14 MR. STAR: Objection to form.

15 A. I have some recollection, yes,
16 that --

17 BY MR. HULME:

18 Q. What is it?

19 A. That --

20 Q. What is that recollection?

21 MR. STAR: He is about to say.

22 A. My recollection is that changes
23 were made to the way the -- the Business One
24 software works. Changes were made to the way
25 the IFE software works. Changes were made to

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1 the Hodell infrastructure that considerably
2 improved the performance of the combination
3 system such that even if that -- his initial
4 reaction had been, which I don't necessarily
5 agree it was, but even if it had been from a
6 technical standpoint, once the adjustments and
7 fixes and improvements and -- were made, both
8 on -- well, all three on Hodell's part to the
9 infrastructure, on LSi's part to the IFE, and
10 on SAP's part to the base software, that even
11 if that were his reaction, it was no longer an
12 accurate reaction.

13 BY MR. HULME:

14 Q. Can we agree that if the
15 development side, the technical side, of SAP
16 was of the opinion, in 2007, that Business One
17 would never work for a company with the
18 characteristics of Hodell, that LSi should have
19 been told?

20 MR. STAR: Objection to form.

21 A. The -- the hypothetical is such
22 that I don't know that I can give -- give an
23 answer in that it's not clear to me that the --
24 that that was ever the case.

25 But even if it were, it wasn't

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1 clear to me that that reaction was known well
2 enough that it was an accurate enough reaction
3 to inform LSi until everything that could be
4 done to improve performance had been done to
5 improve performance. And that clearly wasn't
6 the case until later.

7 BY MR. HULME:

8 Q. So if the technical people at
9 SAP were of the opinion that Hodell was an
10 inappropriate application and that Business One
11 would not work for a customer of the size of
12 Hodell, you would condone not telling either
13 the customer or LSi of those then-existing
14 opinions --

15 MR. STAR: Objection.

16 BY MR. HULME:

17 Q. -- is that correct?

18 MR. STAR: Objection to form.

19 A. I would condone not telling them
20 until everything that could be done was done.

21 And if that -- if that
22 opinion -- if they were of that opinion at a
23 point when they were still actively engaged in
24 making improvements and adjustments that had
25 the potential of ameliorating the problem, then

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1 I think it would be responsible to withhold
2 telling LSi and withhold telling the customer
3 until everything that could be done was done
4 and there was a final determination of that
5 nature.

6 BY MR. HULME:

7 Q. And how much time, in your
8 expert opinion, should be given for that --
9 those attempts to be made?

10 A. Certainly on the order of months
11 would be reasonable.

12 Q. "Months" meaning two or three or
13 "months" meaning ten, 12 or 24?

14 A. "Months" meaning at least two or
15 three and possibly six, eight or ten.

16 Q. Okay. As long as there was
17 progress being made?

18 A. Yes.

19 Q. Have you done any evaluation or
20 what have you done to evaluate whether any of
21 Hodell's performance complaints are objectively
22 valid or reasonable?

23 A. Performance complaints about --
24 well, to the best of my knowledge, there were
25 no performance complaints specifically about

46 (Pages 178 to 181)

<p style="text-align: right;">Page 182</p> <p>1 SAP without the In-Flight extensions. 2 I have taken at face value 3 Hodell's complaints about the performance of 4 the system, including the IFE and Radio Beacon 5 extension. 6 I haven't attempted -- I've 7 assumed that Hodell's complaints that the 8 performance didn't meet its requirements for 9 the combination is accurate. 10 I haven't done anything to -- to 11 verify or to try to dispute the accuracy of -- 12 of that complaint. 13 I haven't seen any complaints 14 about the performance of the SAP Business One 15 software without the IFE and Radio Beacon 16 extensions. 17 Q. Have you done anything to form 18 an opinion as to the cause of the perceived 19 performance issues or the issues perceived to 20 be performance issues by Hodell? 21 A. I have looked at what evidence 22 there is of the cause and I have seen 23 conflicting statements of the cause. I've also 24 seen an understanding at some point that the -- 25 at least in some users' and some LSi</p>	<p style="text-align: right;">Page 184</p> <p>1 specifically here? 2 Q. Yes. 3 A. Yeah, I -- 4 Q. I mean, it ultimately relates to 5 this case. I mean, the ultimate issue in this 6 was is what was the cause of the perceived 7 performance problems. 8 Do you believe you have the 9 expertise to express an opinion on that issue? 10 A. I don't know that I agree with 11 your characterization that that's the ultimate 12 issue. 13 But I can tell you that I have 14 been qualified in federal court on -- to make 15 determinations of that nature in other cases. 16 Q. All right. What nature? 17 A. Whether software was or was not 18 capable of -- of meeting particular criteria 19 and what -- and if it wasn't, what was the 20 cause. 21 I don't think there's enough 22 evidence here for me to do that in this case. 23 But I have done that and have been qualified to 24 do that in other cases. 25 Does that answer your question?</p>
<p style="text-align: right;">Page 183</p> <p>1 personnel's viewpoint, that the performance 2 problems were resolved. 3 But I haven't seen enough 4 evidence to determine specifically -- to lay 5 the specific blame for what Hodell considered 6 to be performance problems unequivocally on one 7 thing or another, but I don't think you can 8 separate those performance problems out between 9 the LSi extensions and the Business One 10 software because they were never tested 11 independently. 12 Q. And I might have -- this might 13 have been an unfair question. 14 But do you hold yourself out as 15 qualified to reach a conclusion as to the cause 16 of the perceived performance problems? 17 MR. STAR: Do you mean in 18 general in a case or on this particular 19 one? 20 MR. HULME: Yes. 21 MR. STAR: Which? 22 BY MR. HULME: 23 Q. I'm just trying to evaluate your 24 role or your perceived expertise. 25 A. In general, you're asking, not</p>	<p style="text-align: right;">Page 185</p> <p>1 Q. Yeah, I believe so. Well 2 enough. Thank you. 3 A. Thank you. 4 MR. STAR: Off the record. 5 We're a couple minutes -- 6 THE VIDEO TECHNICIAN: Going off 7 the record at 14:02. 8 --- 9 (Whereupon, a discussion was 10 held off the record.) 11 --- 12 (Whereupon, a luncheon recess 13 was taken at 2:02 p.m.) 14 --- 15 (Whereupon, the deposition 16 resumed at 2:57 p.m.) 17 --- 18 THE VIDEO TECHNICIAN: Back on 19 the record at 14:57. 20 MR. HULME: Are you guys there? 21 THE VIDEO TECHNICIAN: We're 22 ready. Back on the record. 23 MR. STAR: Sorry. It was muted. 24 Go ahead. 25 THE VIDEO TECHNICIAN: I'm</p>

47 (Pages 182 to 185)

1 sorry. We're back on the record,
2 Counsel.

3 MR. HULME: Okay. Are we all
4 set?

5 THE VIDEO TECHNICIAN: Yes, sir.

6 MR. HULME: Okay.

7 BY MR. HULME:

8 Q. Your opinion number five, which
9 is summarized at Page 4 of your report.

10 A. Yes.

11 Q. You mention, and you state
12 that -- you use the phrase, "without getting
13 normal guidance from SAP."

14 What do you mean by "normal
15 guidance"?

16 A. That refers to the period
17 between December 2004 and December 2005 in
18 particular, and in -- even to some extent after
19 the SAP license agreement was signed, when LSi
20 was beginning to have difficulties developing
21 the add-on and Hodell, I guess, was aware of
22 the -- of some of the problems LSi was
23 encountering, both parties knew, in fact, that
24 it was their expectation that Hodell would sign
25 an LSi license in December of 2005.

1 When issues started to come up,
2 there is no reason why LSi should not have
3 started to raise questions and get the kind of
4 support from SAP to make sure that the IFE
5 extension was being properly developed and
6 efficiently developed, that they didn't
7 actually start to get until pretty much almost
8 until after go-live.

9 And there was ample setbacks
10 from the beginning of the development of the
11 IFE extension up until go-live, where it would
12 have been appropriate for LSi to have
13 highlighted issues it was having and enlisted
14 SAP's assistance in determining whether --
15 whether there was anything about the way they
16 were programming it or anything about the
17 interface that -- that SAP could have helped
18 with, but they didn't do it.

19 Q. So it's your understanding that
20 up until go-live, LSi did not have any
21 communication with SAP about this project?

22 A. If I communicated it that way,
23 that's not entirely true.

24 There wasn't extensive
25 communication back and forth until go-live.

1 And there wasn't even substantive communication
2 or, as I recall, any technical communication at
3 all until a couple months after the SAP license
4 agreement was -- was signed.

5 And -- but from that initial
6 contact during 2005 up until go-live, even then
7 the amount of support that LSi called upon SAP
8 to provide and -- and the number of issues that
9 they raised was -- was extremely -- far more
10 limited than it should have been, given the --
11 the evident problems that -- that it was
12 encountering to the point where at the point of
13 pre-go-live testing, the testing was either
14 practically -- extremely limited or
15 unsuccessful.

16 Q. Well, let me get back to the
17 phrase, "normal guidance."

18 Where do I look at to determine
19 what normal guidance is?

20 A. Let me see if I can define what
21 I meant by normal guidance.

22 LS --

23 Q. First of all, is it a standard
24 some -- is it written down someplace? Is there
25 a standard? Is there a rule book, a procedure

1 manual that sets up what normal guidance is?

2 A. There are -- you know, I
3 haven't -- I didn't mean to refer to some
4 written standard. Although I expect that there
5 are some standards in the business partner
6 relationship, either in the contract or in
7 the -- the guidance that SAP gives to its
8 business partners as to what the normal
9 guidance said it would provide to -- to
10 developers of add-on products would be.

11 But basically that's what I
12 meant.

13 Since LSi was developing add-on
14 software for Business One, what I meant with
15 normal guidance was a back and forth
16 conferring, much like what was done after
17 go-live, to identify potential problems and
18 resolve potential problems and adjust the --
19 the way that the add-on software was being
20 developed to avoid potential problems.

21 Q. But then are you presuming that
22 it was the add-on software that was causing the
23 problems?

24 A. Well, I think I've tried to
25 answer that before in that there was no

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1 comprehensive testing that -- to determine
2 whether -- where the problem lies.

3 The indications were, when there
4 was cursory testing of Business One without the
5 In-Flight extensions, that the performance was
6 good to satisfactory. And that when you added
7 on the -- the IFE, that that's when the
8 problems occurred.

9 But as I mentioned when your --
10 your compatriot was examining me, that there
11 really wasn't enough data at any point to -- to
12 make that determination.

13 All we know is that the
14 performance was signi -- very significantly
15 better in limited observation without IFE and
16 very much significantly worse with IFE.

17 Q. So that when you used the
18 phrase, "normal guidance from SAP," in your
19 opinion number five, what you're meaning is
20 that what SAP would normally choose to give its
21 partner?

22 A. That's correct, the normal type
23 of -- of troubleshooting and development
24 support.

25 By the time go-live happened,

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1 development support wasn't available anymore.
2 But had LSi come to SAP sooner, they could have
3 gotten not only troubleshooting and -- and
4 issue fixing kinds of support, but they could
5 have gotten guidance on ways to improve the way
6 that the IFE was being developed to potentially
7 avoid the kinds of -- of performance issues
8 that ultimately showed out.

9 Q. But you keep coming back to
10 development of the IFE. I'm trying to find out
11 about what you base your conclusion that the
12 development of the IFE was the problem. Or do
13 you reach that conclusion?

14 A. I -- I -- I think I've tried to
15 answer that as best I could by saying, in the
16 limited observation of -- of the Business One
17 without IFE, performance seemed to be
18 satisfactory to -- to reasonably good.

19 When you added IFE on to it,
20 which is how all of the production use was, the
21 performance was no longer -- no longer met
22 Hodell's desires and expectations.

23 So --

24 Q. And those are the assumptions
25 and presumptions you're relying upon to express

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1 that opinion?

2 A. Those are not assumptions and
3 presumptions. Those are facts.

4 Q. Based upon how you recall those
5 facts?

6 A. Well, I've actually cited to the
7 documents and the testimony supporting those
8 facts.

9 Q. And I think Wes has already
10 covered, if you cited it, it's -- I mean, your
11 basis is cited in your report?

12 A. Yes, sir.

13 Q. Opinions five and six both
14 reference normal and customary actions. You
15 accuse LSi and Hodell of not getting normal
16 guidance from SAP and, quote, without taking
17 normal and customary actions, close quote.

18 What -- where do I find what
19 normal and customary actions are?

20 A. If you're quoting and close
21 quoting me, are you talking about in the
22 wording of the opinion itself or in the
23 support, and which opinion?

24 Q. Opinion number five.

25 A. Okay.

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1 Q. The summary of your statement of
2 opinion.

3 A. Okay.

4 Q. And like I said, you accuse LSi
5 and Hodell of taking certain actions, quote,
6 without taking normal and customary actions to
7 avoid potential problems.

8 A. Having --

9 Q. So I'm trying to find out --

10 A. Okay.

11 Q. -- where do I go to find what
12 normal and customary actions are?

13 A. Having worked in this industry
14 for 40 years, I've been qualified as an expert
15 on the normal customs and practices of the
16 industry. I don't know necessarily that there
17 are learned treatises that -- that one could go
18 to, but I've been a part of well over a hundred
19 implementations of business software and I have
20 testified at at least half that -- half that
21 many in addition.

22 I've tried to explain to you
23 what, in my experience, are the normal and
24 customary actions that Hodell and LSi and SAP
25 had reason to expect the other parties would

49 (Pages 190 to 193)

1 do.

2 And I can ex -- you know, I
3 don't know, as I said, that I have a learned
4 treatise that you can go to that will say that.
5 That's based on my 40 years of experience in
6 the industry.

7 Q. So what you're saying is, if I
8 or LSi wanted to know what the normal and
9 customary actions they should have taken were,
10 then ask you?

11 A. Well, also --

12 MR. STAR: Objection to form.

13 A. (Continuing) No, I'm not saying
14 that.

15 In addition to that -- number
16 one, there are lots of experts that they could
17 ask.

18 Number two, there are guidelines
19 that SAP publishes and that its competitors
20 publish as to what levels of support they give
21 to business partners and that they give to
22 customers under different circumstances.

23 So that in this case, if you're
24 talking about the normal and customary support
25 that SAP gives to its business partners, it has

1 a whole series of things that it publishes to
2 business partners as to what they can expect.
3 And that would be what would be relevant in
4 this case.

5 What I'm commenting on here are
6 the customs and practices of the industry, not
7 speci -- which I expect are very congruent with
8 whatever SAP's published levels are.

9 BY MR. HULME:

10 Q. So if I, as a lawyer in this
11 case, wanted to know what the normal and
12 customary actions that you contend my client
13 should have done, I either ask you or I ask
14 SAP?

15 MR. STAR: Objection to form.

16 A. You would -- well, you can
17 ask --

18 MR. STAR: That has not been his
19 testimony.

20 A. (Continuing) You can ask your
21 own expert. You can -- there are lots of other
22 experts out there.

23 You can go to the SAP website.
24 You can get discovery on what the -- SAP's own
25 standards are in dealing with its -- with its

1 business partners.

2 These things aren't secrets.

3 BY MR. HULME:

4 Q. Do you have an opinion as to
5 whether SAP met its own standards in this case
6 before go-live?

7 A. Without any specific
8 recollection of what SAP's standards are, I
9 can't -- I can't say that I do.

10 However, its actions prior to
11 go-live, the period of time at which it had
12 hardly any indication that issues were -- were
13 arising, if any, it was not particularly called
14 upon and consistent with the customs and
15 practices of the industry to do any more than
16 it did.

17 There was nothing -- no support
18 that it failed to give, given what it knew
19 prior to go-live, that are contrary to what
20 would be normal customs and practices of the
21 industry.

22 Q. Okay. So, again, you're saying
23 that LSi and Hodell did not take normal and
24 customary actions because, in your
25 understanding, there was hardly any contact

1 between LSi and SAP before go-live; is that
2 correct?

3 A. SAP could only act on -- on
4 resolving issues if new issues existed. It
5 didn't really have any significant knowledge of
6 such issues.

7 Q. Okay. So, again, one of the
8 bases of your opinion in this case is that SAP
9 did not have any significant indication that
10 LSi was having problems at the development
11 stage; is that correct?

12 A. And not only SAP, but also
13 the -- the project manager -- Ms. Weissman, the
14 project manager for LSi, had -- had -- was
15 unaware of very critical issues that it -- that
16 LSi should have known about that Hodell
17 didn't -- apparently didn't tell it.

18 And, certainly, Mr. Woodrum knew
19 that there were problems with the project. But
20 the scope of the issues that -- that would be
21 uncovered after -- after go-live were never --
22 never revealed even to LSi by -- by Hodell.

23 Q. A simple question.

24 A. Sure.

25 Q. All right? And I'd like a

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1 simple answer, if you can give it to me.

2 A. I'll do the best I can.

3 Q. Can we agree -- can we agree
4 that the premise of your opinion that LSi did
5 not take normal and customary actions to avoid
6 potential problems in the pre-go-live stage,
7 the primary premise of that is that there was
8 hardly any indication given by LSi to SAP that
9 it was having problems during the development
10 phase?

11 MR. STAR: Objection to form.

12 BY MR. HULME:

13 Q. Yes or no?

14 A. I don't know that I would say
15 that. I might say that was primary. I don't
16 know necessarily that I would characterize that
17 as primary. But that's certainly a major
18 issue.

19 Q. Okay. What other issues then,
20 besides that, do you base your opinion upon
21 that they did not take normal and customary
22 actions?

23 A. Let me take a look at the
24 support for my opinion.

25 Q. Sure.

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1 (Pause)

2 A. Well, the fact that LSi didn't
3 do the things that it -- it should have done
4 during the development, such as preparing a --
5 a formal fit/gap, such as getting Hodell
6 approval of specifications.

7 Q. Before going -- before -- I'm
8 trying to save -- excuse me. Before -- saving
9 time -- are you just simply going to go down
10 your list of bullet points?

11 A. Not necessarily all of them.

12 Q. Because I can read those.

13 A. Not necessarily all of them,
14 but --

15 Q. But they're all included in this
16 list? Can we say they're all included in this
17 list?

18 A. Sure.

19 Q. Okay. All right. Go to the top
20 of Page 29 then.

21 A. I'm there.

22 Q. Your very first bullet point.

23 A. Yes.

24 Q. "Hodell's (and possibly LSi's)
25 withholding the fact from SAP that it expected

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1 it would ultimately need to 'scale up' the
2 Business One/In-Flight/Radio Beacon . . . to
3 support three to four times as many users (in
4 other words, 250 or more) as the 80 it had
5 originally licensed."

6 Now, are you aware that
7 Mr. Van Leeuwen has testified that he had a
8 personal meeting with SAP where he explained to
9 them that he was envisioning using SAP Business
10 One product in a business and then described
11 the characteristics of Hodell?

12 MR. STAR: Objection to the
13 form. If you -- well, go ahead.

14 BY MR. HULME:

15 Q. Were you aware of that?

16 A. I'm -- could you -- could you
17 restate that? I'm not sure I caught all of
18 it.

19 Q. Sure. Are you aware that
20 Mr. Van Leeuwen has testified that he sat down
21 with SAP and their representatives and
22 explained to him that he had a business with
23 certain characteristics and he wanted to know
24 whether Business One could meet those and
25 address those characteristics?

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1 MR. STAR: Objection to form.

2 It assumes facts that aren't in evidence
3 and testimony that doesn't exist.

4 A. I don't remember the specific
5 testimony or the -- the level of -- or any
6 details of that testimony to the level of
7 specificity that you've described.

8 BY MR. HULME:

9 Q. Are you assuming that nobody
10 from LSi sat down with SAP and outlined their
11 intended use of Business One at Hodell?

12 A. With the --

13 MR. STAR: Objection to form.
14 Go ahead.

15 A. (Continuing) Are you
16 specifically referring at this point to the
17 scaling up to 250 or more users?

18 BY MR. HULME:

19 Q. Yes. One, scaling up to 250 or
20 more users. And two, describing the
21 transaction volume that was expected.

22 Are you assuming that
23 conversation did not take place?

24 MR. STAR: Object to form.

25 A. I've seen no evidence that would

51 (Pages 198 to 201)

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1 support that sort of communication from
2 Mr. Van Leeuwen to SAP at the level of -- of
3 detail that -- that you've described.

4 BY MR. HULME:

5 Q. Okay. So you're assuming it did
6 not happen? For purposes of your opinions in
7 this case, you're assuming it did not happen?

8 A. I'm -- I have no evidence that
9 there was a discussion at that level of
10 specificity that happened. And lacking any
11 such evidence, I have to assume that -- that it
12 didn't happen.

13 Q. Okay. What testing do you
14 believe should be done on the Business
15 One/In-Flight/Radio Beacon software solution
16 before go-live?

17 A. Well, you have to have a
18 satisfactory unit testing, satisfactory
19 integration testing, and then you have to have
20 a user acceptance test where -- including
21 testing -- what's called stress testing of the
22 volumes involved with a -- with acceptable
23 results rather than unacceptable results.

24 And while there is dispute as to
25 how much testing was done, there's no dispute

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1 that whatever testing was done, there was never
2 any stress testing at -- at anywhere near the
3 volumes that the system would be called upon to
4 support that produced passable results.

5 And so, I mean, it's up to the
6 ultimate customer to accept the test results or
7 not. In this case, the only knowledgeable
8 employee of the customer said that the software
9 flat-out did not perform adequately during the
10 test.

11 So what I say is, it has to
12 be -- it has to perform adequately in the test
13 in the judgment of the -- of the customer.

14 Q. So when you define adequate
15 testing, are you defining that as results that
16 are acceptable to the customer?

17 A. Well, the adequate testing is
18 testing of the functionality and testing of the
19 performance at a stress testing level. And by
20 that, I mean at the volumes of transactions and
21 the volumes of data that the software would --
22 will be called upon to perform once it's put
23 into production use.

24 And that testing should include
25 all of the needed functionality and should be

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1 at the right stress-tested capacity.

2 The decision on the pass or fail
3 is the customer's decision. It's not a --
4 there's not a set criteria. If it's not
5 acceptable to the customer, then it's not
6 passed. And if it is, it is.

7 Q. I'm trying to determine what you
8 mean by the phrase, "before completing adequate
9 testing." I didn't know if adequate testing
10 described the testing protocol or whether it
11 described the results.

12 A. Both.

13 Q. All right. And in this case,
14 what testing -- what protocols do you believe
15 were not followed that should have been
16 followed for it to be deemed adequate testing?

17 A. There were certainly individuals
18 that told Ms. Weissman that the amount of
19 testing that they did was cursory. That
20 wouldn't be adequate.

21 There was --

22 Q. Okay.

23 A. There were people who told
24 Ms. Weissman, as I recall, that the volumes
25 of -- of data and so forth that were tested

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1 were minimal. That wouldn't be adequate.

2 Now, Mr. Phillips disputes that.
3 But even in that dispute, he said the results
4 were so bad that the system, as it was tested,
5 was not usable. And, therefore, he recommended
6 to Mr. Reidl that Hodell not go live.

7 So not only from a procedural
8 standpoint do you have to do adequate -- and by
9 "adequate," I mean comprehensive -- testing of
10 functionality, not only do you have to do
11 stress testing, but you have to have a result
12 that is satisfactory and will be satisfactory
13 to the customer once the go-live occurs.

14 So it's both the process and the
15 result.

16 Q. Sir, I was asking about the
17 protocol, the process.

18 A. I think I just answered the --

19 Q. Now, my question is -- well,
20 you've answered more than that. And I'm just
21 trying to now limit this to the protocol.

22 Can we agree that the
23 instructions of LSi to fully load the system
24 with your -- a hundred percent of your people
25 who you expect to have use it, using the data

52 (Pages 202 to 205)

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1 that you expect them to have -- use, is a
2 proper protocol?

3 A. Yes.

4 Q. Okay. And --

5 A. It's part of a proper protocol.

6 Q. Can you think of any other
7 testing that you believe should have been done
8 from a protocol standpoint for you to consider
9 the testing to have been adequate from a
10 protocol standpoint?

11 A. Had -- it would have to have
12 been done with real data. It would have to
13 have been done with the volume of data on the
14 system that the system will ultimately need to
15 support. And -- and it would have to be done
16 with a number of concurrent users that the
17 system will ultimately have to support.

18 There is a dispute between
19 Mr. Phillips and Ms. Weissman, or there is
20 contrasting testimony between the two of them,
21 as to whether or to what level that was done.

22 Q. I didn't ask if there was a
23 dispute.

24 My question was, what was the
25 proper protocol? You also said in addition

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1 information, but I just don't recall it today,
2 as we sit here.

3 Q. Well, in regard to opinion
4 number six then, are you focusing on and is
5 that limited to the load testing?

6 A. It -- it -- I'm focused in
7 opinion six on the user acceptance test, which
8 occurs after the unit test and after the
9 integration test. And then it's the portion of
10 the testing that's done by the customer.

11 Q. And now -- now I'm going to get
12 to the what's acceptable standard of adequate
13 testing, the results standpoint.

14 A. Okay.

15 Q. If three people -- if three
16 people at the customer's facility say it's
17 acceptable and one says it is not, what's your
18 opinion as to whether that was -- testing was
19 acceptable?

20 A. It depends on the qualifications
21 of the three people. If the one who says it's
22 not is the one with the most expertise, then I
23 would go with the one with the most expertise.

24 Q. Well, and if the performance
25 issue is slowness -- okay?

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1 to --

2 A. I retract the last --

3 Q. -- protocol testing, would
4 require, also, unit testing.

5 What is unit testing?

6 A. Unit testing is where you test
7 each of the individual functions of the
8 software and determine that they're working
9 properly.

10 Q. And in this case, when you say
11 unit testing should have been done, are you
12 referring to the software solution, meaning
13 In-Flight, Radio Beacon and Business One?

14 A. Yes. And unit testing is
15 typically done by the -- the implementer in a
16 case like this.

17 Q. All right. And is that done --
18 that can be done off site?

19 A. Yes.

20 Q. Okay. In this case, do you know
21 whether unit testing was done?

22 A. I don't, off the top of my head,
23 recall the evidence on the level of unit
24 testing that was done.

25 I do believe I saw some

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1 A. Yes.

2 Q. -- if that's the criteria that's
3 being used, wouldn't you more readily rely upon
4 the user as opposed to that person who had the
5 most technical expertise?

6 A. You --

7 MR. STAR: Objection to form.

8 A. (Continuing) You'd have to look
9 at the individual situation. But, in general,
10 I would rely on -- well, certainly if the user
11 was dissatisfied, I -- I -- I would think that
12 that would be important information.

13 But if the user was satisfied,
14 but the one with the most technical expertise
15 has said, hey, this isn't adequate, I -- I
16 would go with the one with the most -- the most
17 technical expertise because they're -- they're
18 the one -- that person or those persons, in
19 some cases, would be the one with the most
20 ability to generalize from individual
21 experience into what would happen once the --
22 the solution actually goes live in a production
23 environment. Individual users --

24 BY MR. HULME:

25 Q. What's your --

53 (Pages 206 to 209)

<p style="text-align: right;">Page 210</p> <p>1 A. -- can't do that generalization.</p> <p>2 Q. What's your opinion as to</p> <p>3 whether a development team has an obligation to</p> <p>4 report to its sales team inherent limitations</p> <p>5 in the product from a technical or functional</p> <p>6 standpoint?</p> <p>7 MR. STAR: Objection to form.</p> <p>8 A. I -- I think full transparency</p> <p>9 from development to marketing to sales is -- is</p> <p>10 good and important.</p> <p>11 BY MR. HULME:</p> <p>12 Q. And would you agree with me that</p> <p>13 it would fall below the standard of care for a</p> <p>14 development team not to communicate to its</p> <p>15 sales team inherent limitations in the product?</p> <p>16 A. I mean, do you have a specific?</p> <p>17 Q. Yes. That this thing probably</p> <p>18 won't work for companies with 120 users.</p> <p>19 MR. STAR: Objection to form.</p> <p>20 A. Well, if that were a fact, that</p> <p>21 would be something that probably should be</p> <p>22 communicated. But we know it's not a fact</p> <p>23 because Business One has numerous installations</p> <p>24 far in excess of 120 users.</p> <p>25 BY MR. HULME:</p>	<p style="text-align: right;">Page 212</p> <p>1 litigation, correct?</p> <p>2 A. The vast majority, yeah.</p> <p>3 Q. All right. And in those years</p> <p>4 of being an expert witness in litigation, have</p> <p>5 you ever been asked a hypothetical question?</p> <p>6 A. Yes.</p> <p>7 Q. And have you ever answered that</p> <p>8 hypothetical question directly?</p> <p>9 MR. STAR: Objection to form.</p> <p>10 Argumentative.</p> <p>11 A. I've answered hypothetical</p> <p>12 questions directly today. There are some</p> <p>13 hypothetical questions --</p> <p>14 BY MR. HULME:</p> <p>15 Q. You have not. You have always</p> <p>16 added -- you have always added that you don't</p> <p>17 believe the facts support such a hypothetical.</p> <p>18 You have always added the additional qualifier</p> <p>19 that you can't answer that question because it</p> <p>20 is not supported by the facts in this case.</p> <p>21 That I want as a definition. I</p> <p>22 want you to assume that that is not a direct</p> <p>23 answer to a hypothetical. Okay? Can you</p> <p>24 assume that for me?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 211</p> <p>1 Q. And if that was the opinion of</p> <p>2 the development team, that it would not be an</p> <p>3 appropriate program for a company with 120</p> <p>4 users, would you agree with me that it falls</p> <p>5 beneath the standard of care of a software</p> <p>6 developer not to report that to their sales</p> <p>7 team?</p> <p>8 MR. STAR: Objection to form.</p> <p>9 A. You -- you -- you've asked me</p> <p>10 for a hypothetical that's contrary to the known</p> <p>11 facts. And it's hard for me to -- to speculate</p> <p>12 on an answer that's contrary to the -- the</p> <p>13 known facts.</p> <p>14 To the best of my knowledge,</p> <p>15 there were no -- there were concerns about</p> <p>16 scalability. And those were communicated. But</p> <p>17 they weren't hard and fast, no, it can't</p> <p>18 support 120 users. No, it can't support 200</p> <p>19 users. And, in fact, we know that it did -- it</p> <p>20 could and did support more than 120 and more</p> <p>21 than 200 users.</p> <p>22 BY MR. HULME:</p> <p>23 Q. Sir, you testified that</p> <p>24 your -- essentially a hundred percent of your</p> <p>25 time is devoted to being an expert witness in</p>	<p style="text-align: right;">Page 213</p> <p>1 MR. STAR: Wait a second. I</p> <p>2 object, Roy --</p> <p>3 MR. HULME: Okay.</p> <p>4 MR. STAR: I object, Roy, to you</p> <p>5 arguing with the witness. Just because</p> <p>6 your characterization of his testimony is</p> <p>7 one thing doesn't mean that's what it is.</p> <p>8 He's answered your questions.</p> <p>9 He's answered hypotheticals that are put</p> <p>10 to him in a proper way by qualifying them</p> <p>11 to tell you what information is missing</p> <p>12 from the hypothetical.</p> <p>13 When you give a very vague</p> <p>14 hypothetical, the witness is allowed to</p> <p>15 fill in the missing elements that qualify</p> <p>16 his answer appropriately.</p> <p>17 Go ahead.</p> <p>18 MR. HULME: Okay.</p> <p>19 BY MR. HULME:</p> <p>20 Q. What is the basis upon which SAP</p> <p>21 based statements that Business One was good for</p> <p>22 companies with 300 or 500 employees?</p> <p>23 MR. STAR: Objection to form.</p> <p>24 Outside the scope of his report. Lacks</p> <p>25 foundation.</p>

54 (Pages 210 to 213)

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1 Only answer if you know. Don't
2 speculate. If that's not something you
3 looked at, you can explain that.

4 A. I'm not sure I caught the whole
5 question.

6 BY MR. HULME:

7 Q. My question is -- and maybe you
8 don't know the answer to this -- upon what did
9 SAP base statements that Business One was good
10 for a company of 300 or 500 employees?

11 A. What's- -

12 MR. STAR: Same objection.

13 A. (Continuing) What statements?
14 I didn't see any statements of that nature.

15 BY MR. HULME:

16 Q. Okay. Have you seen any of the
17 marketing literature of the SAP Business One?

18 A. Yes.

19 Q. Okay. And did you see any of
20 that literature, do you have any recollection
21 of it saying that this is appropriate for
22 businesses of from three to 500 employees?

23 MR. STAR: Objection to form.

24 A. Oh, now you're talking
25 employees, not -- not -- not concurrent users?

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1 BY MR. HULME:

2 Q. I'm just asking you, what is the
3 basis, if you know, of them expressing an
4 opinion that this was appropriate for companies
5 from 300 or 500 employees? Do you know what
6 the basis of that was?

7 A. You've changed the premise on
8 me. A minute ago, you were talking three to
9 500 users, not three to 500 employees. And I'm
10 just trying to get some clarification on that.

11 MR. STAR: He's referring to
12 marketing documents that he's not showing
13 you and he's asking you if you know what
14 information SAP put into those documents,
15 how it came up with that.

16 And if you hadn't looked at that
17 and you don't know the answer, he's
18 telling you, you can say you don't know.

19 But you can answer the question
20 in the way that you understand it.

21 BY MR. HULME:

22 Q. And by the way, just so you
23 know, would you agree with me it's easy to
24 confuse the words "users" and "employees" when
25 it comes to software?

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1 A. No.

2 Q. Well, then, why did you confuse
3 it when I said "employees" every time and you
4 heard me say "user"?

5 MR. STAR: He didn't.

6 MR. HULME: Read back the
7 transcript, please, from when I started
8 asking those questions.

9 MR. STAR: Ask him the question.

10 Go ahead and answer it.

11 MR. HULME: I just did.

12 Will the court reporter please
13 go back to when I first used the word
14 "300" and read him my question.

15 - - -

16 (Whereupon, the court reporter
17 read back the following:

18 "QUESTION: What is the basis
19 upon which SAP based statements that
20 Business One was good for companies with
21 300 or 500 employees?")

22 - - -

23 MR. HULME: Go to the next time
24 I said, "300 or 500."
25 - - -

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1 (Whereupon, the court reporter
2 read back the following:

3 "QUESTION: My question is --
4 and maybe you don't know the answer to
5 this -- upon what did SAP base statements
6 that Business One was good for a company
7 of 300 or 500 employees?"

8 "QUESTION: I'm just asking you,
9 what is the basis, if you know, of them
10 expressing an opinion that this was
11 appropriate for companies from 300 or 500
12 employees? Do you know what the basis of
13 that was?"

14 - - -

15 A. Okay. I think I can explain why
16 I was confused, and that's because all day,
17 we've been talking about Hodell's insistence
18 that it needed to support 200 to 500 users, and
19 then you bring up the same number now in the
20 same -- in a similar context.

21 I misheard it. Had I -- had I
22 been evaluating it -- a written document -- and
23 I will grant you that under the context of the
24 questions you've asked me, it is easy to
25 misstate that. But when you're looking at a

55 (Pages 214 to 217)

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1 written document, and the written document says
2 "employees," there's no confusion that that
3 means employees and not users.

4 But we've been talking 300 to
5 500 or 250 to 500 users for the last five
6 hours. And this time you said "employees."
7 And, quite frankly, I agree with you, I didn't
8 catch it.

9 But had it been in a pre-sale
10 situation and I saw it on marketing literature
11 or had you shown me the marketing literature
12 where it showed users, not employees, and I had
13 read it, I wouldn't have misheard you.

14 They're two different things.

15 BY MR. HULME:

16 Q. What sense does it make in
17 marketing literature to use the word
18 "employees" when you're trying to sell
19 software?

20 A. It's very common to use
21 "employees," because that's the way companies
22 think of themselves.

23 When you talk about -- to a
24 company about how big they are, they tend to
25 tell you number of employees and they tend to

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1 tell you their annual volume.

2 And, in fact, in European
3 economic community's definition of an SME, that
4 also refers to employees or annual sales
5 volume.

6 So that -- that's the way
7 companies think of themselves.

8 Q. You testified that you last
9 developed software in 1972, correct?

10 A. Correct.

11 Q. Your medium, did you use punch
12 tapes or magnetic cards? What was the storage
13 method of your development? Punch cards? What
14 was it?

15 A. I think it was punch cards, for
16 the most part.

17 Q. So the last time that you did
18 any software development, the method of
19 software development utilized punch cards?

20 A. That's correct. That's the way
21 I did it on the Mariner and Surveyor space
22 project. That's the way I did it on the
23 Honeywell software development project. And
24 that's the way I did it in the Coast Guard.

25 Q. Those were all before 1972?

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1 A. Correct.

2 Q. Okay. Is it your understanding
3 that LSi did not have a complete understanding
4 of the transaction volume and other
5 characteristics of what Hodell would need
6 before they recommended Business One?

7 A. Well, we know from the project
8 manager, Ms. Weissman, that they didn't have it
9 as of the time of going live. So there's no --
10 and there's no evidence that they had it at
11 some time and lost it.

12 So since they didn't have that
13 information at go-live time, the only -- and
14 there's no contrary evidence, the only
15 presumption I can make is that they -- they
16 didn't have it from the outset.

17 Q. And so you're expressing your
18 opinions in this case on the assumption that
19 LSi did not understand the business, the
20 transaction volume, that Hodell required in its
21 normal business operations, correct?

22 A. The --

23 MR. STAR: Objection to form.

24 A. (Continuing) The project
25 manager, Ms. Weissman, testified to that

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1 effect. She's the key individual.

2 I'm -- I'm relying on -- not
3 entirely, but certainly to a great extent, on
4 her testimony.

5 BY MR. HULME:

6 Q. All right. And what did you
7 understand Ms. Weissman's role to be, her
8 duties and responsibilities?

9 A. She was, as I recall, the
10 project manager for this development. She
11 wasn't the -- the developer. That was
12 Mr. Guagenti, I believe. And I believe his
13 testimony was, he didn't have very much of that
14 information either.

15 Q. That's your recollection,
16 also --

17 A. Yes.

18 Q. -- is that correct?

19 A. Yes.

20 Q. So your opinions that LSi didn't
21 have all the facts is based upon your
22 recollection of Ms. Weissman's testimony and
23 Mr. Joe Guagenti's testimony, correct?

24 A. Well, it's also based on the
25 fact that there was no fit/gap and there was no

56 (Pages 218 to 221)

Page 222	Page 224
<p>1 specification for what they were doing, 2 where -- which would be the customary places 3 where that sort of information would -- would 4 be documented. 5 So the documentation that LSi 6 should have had of that information was 7 missing. 8 Q. Well, all you really care about 9 is that you have the knowledge, correct? 10 A. No. 11 MR. STAR: Objection to form. 12 A. (Continuing) I don't agree. 13 BY MR. HULME: 14 Q. All right. Can we agree -- 15 A. No. No matter how -- 16 Q. -- that if -- 17 A. No matter how much knowledge you 18 have, you can't develop something properly 19 unless you have the proper -- you've taken the 20 proper steps, you've done the proper 21 documentation to do the development. 22 And there's no indication that 23 LSi had taken those steps or had that 24 documentation. 25 Knowledge, in and of itself,</p>	<p>1 and read him testimony and tell him that 2 he's wrong, you can do that. But don't 3 interrupt him in the middle of answering 4 a question. 5 You asked him what he 6 understands and he's telling you. 7 MR. HULME: Well, then don't 8 give any speaking objections, Greg. Then 9 just say objection instead of doing 10 speaking objections. 11 MR. STAR: You know what? It's 12 more than an objection, Roy. You're 13 interrupting the witness in the middle of 14 a question that you asked because you 15 don't like the answer. 16 So if you want to tell me that 17 that's appropriate -- 18 MR. HULME: I could care less -- 19 MR. STAR: -- then go ahead. 20 MR. HULME: -- what his answers 21 are. 22 MR. STAR: Pardon? 23 MR. HULME: All right. 24 MR. STAR: What did you say? 25 MR. HULME: I said I could care</p>
Page 223	Page 225
<p>1 isn't enough. You've got to document. Every 2 single -- every single resource on development 3 calls for documentation. 4 Q. So you're saying that because 5 Ms. Weissman and Mr. Guagenti did not have a 6 piece of paper that said what the generally 7 accepted transaction volume would be, what the 8 database size would be or what the user count 9 would be, that's why you say LSi didn't know 10 that information, correct? 11 MR. STAR: Objection to form. 12 A. I -- Ms. Weissman said LSi 13 didn't know that. And -- 14 MR. HULME: No. Excuse me. 15 A. (Continuing) And the 16 evidence -- 17 MR. STAR: Whoa, whoa, whoa, 18 whoa, whoa. 19 Roy -- 20 MR. HULME: Let me correct one 21 thing before you go further. 22 Ms. Weissman said she didn't 23 know that. 24 MR. STAR: No, no, no. 25 Look, if you want to show him</p>	<p>1 less what his answers are. I just want 2 them -- 3 MR. STAR: Good. 4 MR. HULME: -- down on the 5 record. 6 MR. STAR: You know what? We're 7 past our hard stop, so we're done. That 8 concludes today. That concludes this 9 deposition. 10 THE VIDEO TECHNICIAN: Off the 11 record? 12 MR. HULME: Was that your -- 13 this does not conclude this deposition. 14 MR. STAR: It does. 15 MR. HULME: I will take his 16 deposition further if I need to take his 17 deposition further. And I do need to 18 take his deposition further. 19 MR. STAR: You will not. 20 MR. HULME: And I'm ready, 21 willing and able to continue and will. 22 MR. STAR: You will not. You're 23 past your agreed time. We're done. 24 He'll read and sign. 25 THE VIDEO TECHNICIAN: The time</p>

57 (Pages 222 to 225)

1 now is 15:49. This concludes the
2 deposition. End of tape four of four.

3 MR. HULME: Excuse me. The
4 record shall reflect this deposition is
5 not concluded. That Mr. Star is walking
6 out of the deposition with the witness.

7 MR. STAR: No. The record will
8 actually show we had an agreement to stop
9 at 3:45 so the man can catch a flight,
10 which you've already gone past. And look
11 at your watch, Roy.

12 MR. HULME: I told you what
13 my --

14 MR. STAR: Look at your watch.

15 MR. HULME: -- suggestion was.
16 Go ahead.

17 MR. STAR: But where is your
18 deposition notice? Serve a notice before
19 you try to take a deposition.

20 We're done.

21 THE WITNESS: He said he doesn't
22 care what I answer anyway.

23 MR. STAR: Right. Exactly. He
24 didn't care what you answered anyway, so
25 why does he ask it.

1 THE WITNESS: Yeah.

2 MR. STAR: We're done.

3 MR. HULME: As long as it's on
4 the record, I don't care what your answer
5 is.

6 ---

7 (Witness excused.)

8 ---

9 (Whereupon, the deposition was
10 adjourned at 3:50 p.m.)

11 ---

1 C E R T I F I C A T E

2
3 I, CHERYL L. GOLDFARB, a Notary
4 Public, do hereby certify that the foregoing
5 deposition of BROOKS LOUIS HILLIARD, was taken
6 before me, pursuant to notice, at the time and
7 place indicated; that said deponent was by me
8 duly sworn to tell the truth, the whole truth,
9 and nothing but the truth; that the testimony
10 of said deponent was correctly recorded in
11 machine shorthand by me, to the best of my
12 ability, and thereafter transcribed under my
13 supervision with computer-aided transcription;
14 that the deposition is a true record of the
15 testimony given by the witness; and that I am
16 neither of counsel nor kin to any party in said
17 action, nor interested in the outcome thereof.

18 WITNESS my hand and official
19 seal this 4th day of November, 2012.

20
21
22
23 _____
24 CHERYL L. GOLDFARB, RPR
25 Notary Public

1 DEPOSITION REVIEW
2 CERTIFICATION OF WITNESS

3 ASSIGNMENT NO: 1553425
4 CASE NAME: Hodel-Natco Industries, Inc. v. SAP America, Inc.
5 DATE OF DEPOSITION: 11/2/2012
6 WITNESS' NAME: Brooks Louis Hilliard, CMC, CCP
7 In accordance with the Rules of Civil
8 Procedure, I have read the entire transcript of
9 my testimony or it has been read to me.
10 I have made no changes to the testimony
11 as transcribed by the court reporter.

12
13 Date Brooks Louis Hilliard, CMC, CCP
14 Sworn to and subscribed before me, a
15 Notary Public in and for the State and County,
16 the referenced witness did personally appear
17 and acknowledge that:

18 They have read the transcript;
19 They signed the foregoing Sworn
20 Statement; and
21 Their execution of this Statement is of
22 their free act and deed.

23 I have affixed my name and official seal
24 this ____ day of _____, 20____.

25 _____
Notary Public

Commission Expiration Date

1 DEPOSITION REVIEW
2 CERTIFICATION OF WITNESS

3 ASSIGNMENT NO: 1553425

4 CASE NAME: Hodell-Natco Industries, Inc. v. SAP America, Inc.

5 DATE OF DEPOSITION: 11/2/2012

6 WITNESS' NAME: Brooks Louis Hilliard, CMC, CCP

7 In accordance with the Rules of Civil
8 Procedure, I have read the entire transcript of
9 my testimony or it has been read to me.

10 I have listed my changes on the attached
11 Errata Sheet, listing page and line numbers as
12 well as the reason(s) for the change(s).

13 I request that these changes be entered
14 as part of the record of my testimony.

15 I have executed the Errata Sheet, as well
16 as this Certificate, and request and authorize
17 that both be appended to the transcript of my
18 testimony and be incorporated therein.

19 _____
20 Date Brooks Louis Hilliard, CMC, CCP

21 Sworn to and subscribed before me, a
22 Notary Public in and for the State and County,
23 the referenced witness did personally appear
24 and acknowledge that:

25 They have read the transcript;

They have listed all of their corrections
in the appended Errata Sheet;

They signed the foregoing Sworn
Statement; and

Their execution of this Statement is of
their free act and deed.

I have affixed my name and official seal
this _____ day of _____, 20____.

Notary Public

Commission Expiration Date

1 ERRATA SHEET

2 RENNILLO DEPOSITION & DISCOVERY - A VERITEXT COMPANY

3 ASSIGNMENT NO: 1553425

4 PAGE/LINE(S) / CHANGE /REASON

5 _____

6 _____

7 _____

8 _____

9 _____

10 _____

11 _____

12 _____

13 _____

14 _____

15 _____

16 _____

17 _____

18 _____

19 _____

20 _____
21 Date Brooks Louis Hilliard, CMC, CCP

22 SUBSCRIBED AND SWORN TO BEFORE ME THIS _____

23 DAY OF _____, 20____.

Notary Public

Commission Expiration Date

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C E R T I F I C A T E

I do hereby certify that I am a Notary Public in good standing, that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 7th day of NOV., 2012.

Cheryl L. Beafair

Notary Public